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Cape of Good Hope. Supreme Court. 6 25
"CAPE TIMES" LAW REPORTS.

A RECORD

OF



**EVERY MATTER DISPOSED OF IN THE SUPREME COURT,
DURING THE QUARTER ENDING 31ST MARCH, 1892.**

EDITED BY

J. D. SHEIL,

**OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE
SUPREME COURT.**

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PART I.—VOL. II.

CAPE TOWN:

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1892.

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"CAPE TIMES" LAW REPORTS.

SUPREME COURT.

(IN CHAMBERS.)

TUESDAY, JANUARY 5.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice SMITH.]

THE PETITION OF ELIZABETH GILL.

Mr. Graham moved for leave to the Master to pay out certain moneys for the education of petitioner's children. Petitioner stated that she was married some years ago to J. T. Lawton, and had issue two children, who were now aged ten and twelve years respectively. Her late husband died in June, 1881, leaving no will. In December, 1882, the executor dative paid into the hands of the Master £290 18s. as the share of the two children. In December, 1883, petitioner married one J. W. Gill, who for the past four months had been out of employment. Neither petitioner nor her present husband was possessed of any funds, and she applied to the Court for an order authorising the Master to pay her £5 per month for two years for the education of the children.

Mr. Justice Smith: Surely £5 per month is too much for the education of children in their position.

Mr. Graham admitted that the amount seemed high, but said it probably included maintenance as well.

The Court granted an order authorising the Master to pay to the petitioner, for the purpose mentioned in the petition, the sum of £4 per month. The Chief Justice, in granting the order, remarked that the Master had suggested that if applications similar to this one were made to him in the first instance he could report to the Court, and a great deal of expense would be saved.

SUPREME COURT.

MONDAY, JANUARY 11.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

STRUBEN AND OTHERS V. CAPE DISTRICT WATERWORKS COMPANY.

Mr. Schreiner and Mr. Graham appeared for the plaintiffs, and Sir T. Upington and Mr. Juta for the Company.

The hearing of this case was resumed—(For facts and pleadings *vide* 1 C.T.L.R., p. 333.)

Mr. W. H. Finlay, Chief Assistant Astronomer at the Royal Observatory, said he had known the Liesbeek River about eighteen years, and during the summer of 1891 he noticed that the flow of the river was considerably less in relation to previous years. That summer was by no means a dry one; the total rainfall for the summer was slightly above the average. On the 4th of March of that year the river was totally dry, which he had never observed before.

By Sir T. Upington: He did not know who was responsible for the decreased flow of the river.

By the Chief Justice: He could not say that in March, 1891, there was less water in the river than he had ever seen before, taking the month as a whole. His attention was not called to that point, nor did he take any measurements.

The Chief Justice: When did the company commence their main work?

Sir T. Upington: In December, 1890. The public were first supplied then.

By the Court: His general impression was that there was less water in the river since the beginning of 1891 than before that time. He could not speak positively, but he gave his general impression. He also saw the river perfectly dry on December 27 last. He could not say if at the present time there was less water in the river than before.

Mr. H. W. Struben, the principal plaintiff, said his property was on both sides of the river. The

cost of this particular property was about £12,000, and it was used for cattle-breeding purposes. During the first portion of 1889 there was sufficient water for his purposes, but after that the supply got weaker. During the early part of 1891 the supply fell off so markedly that he had to send his cattle away, although, when he bought the property, there was irrigation on both sides of the river. This year he had not attempted to cultivate. He considered that he had sustained damage in that his crops had failed, and that the value of the property had greatly depreciated.

By Sir T. Upington: He first occupied in 1889, and put up a new sluice-gate at the end of last summer. He had 110 acres near the river, about forty or fifty acres being capable of irrigation. He presumed that he had the right to take what water he required, and let the surplus run back into the river, so long as his demands were reasonable. The only reason that the farm had not answered was that the water supply had failed. In the summer of 1889-90 he had about ten or fifteen acres under irrigation, and in that of 1890-91 about twenty acres. He confessed that at the beginning of the present summer he intended irrigating forty or fifty acres if the water supply allowed that course being taken.

By the Court: In 1889-90 the water supply was sufficient. He ascribed the diminution of the water supply to the action of the Water Company. Supposing that the riparian proprietors above the company's works were taking out much more water than before, that would to some extent account for the diminution at his place.

Mr. Justice Smith: Are you aware that a proprietor above you has placed a sluice-gate very much higher than before, and is taking out much more water than previously?

Witness said he believed that such was the fact.

Mr. Justice Smith: If the quantity which flows into the river at the Albion Spring now is equal to that which flowed before, I don't see how you are injured.

Witness said he was not injured if he got the same quantity of water that he got formerly.

Solomon Eastwell, foreman miller at Forrest's Rondebosch Mills, said he had known the river from childhood. Last year the supply of water was so restricted that the works, which were carried on partly by water power, had to be stopped. For the purposes of the milling operations a steady flow of water was required. There was formerly a strong leakage at the Albion Spring into the river. He considered that his employer had sustained £70 to £80 damage by the restriction of the supply.

By Mr. Juta: The height of Mr. Forrest's sluice-gates was about 4 feet 6 inches. They had not altered in height during the last ten years,

so far as he knew. The mill-race was not large enough to take the whole of the river's supply, but the mill could take all except any that leaked. Above Mr. Forrest's place Mr. Johnson, a riparian owner, had a very large nursery garden, which depended on the river for its water supply. The works had a very fair supply this summer, but the time he complained of was last summer.

Mr. John Forrest, of J. Forrest & Co., millers, Rondebosch, corroborated the evidence of the previous witness, and said that he was only able to work the mill during the summer of 1891, when rain fell in April. Last year the river was very much polluted as well. He had known the river since 1874, and in his experience had not known the river so low as it was during 1891. From his knowledge of the river he said that the Albion was the principal source. There was formerly a good supply from Newlands, but that was now taken away.

The Chief Justice: By whom?

Witness: The Water Company, or Ohlsson's Breweries, or some one. They manage it somehow. Continuing, witness said he considered that the river was at its lowest in March.

By Sir T. Upington: When he made his affidavit in April, 1891, he knew that the company's works were in existence. When he made his affidavit in April, 1891, in connection with an action against Ohlsson's Breweries, he stated on oath that he believed the river was diverted by the Brewery Company. He had the diversion of the Water Company in view as well, however, at that period.

Sir T. Upington: As a hard-headed business man, do you mean to say that if, when you made the affidavit in April, 1891, you had this most important diversion by the Water Company in view, you would not have mentioned it?

Witness: I am only one of the plaintiffs, and if I had had my way I would have had the two cases against the brewery and the Water Company tried in one.

The Chief Justice: At the time you made that affidavit had the present case commenced?

Witness: It was in contemplation.

By Sir T. Upington: The sluice-gate was 4 feet 6 inches high, *plus* 9 inches of loose board, which was movable. It had been the same for the last eighteen years.

Re-examined: In the action against the Brewery Company the plaintiff failed, and no order was made against the company. The present case was on the way to being tried when he made the affidavit of 1891.

Mr. A. Sinclair, a riparian owner living above the mill, said he had lived near the river seventeen years. During 1891 there was less water in it than he had ever known before. On one occasion he used a small garden engine, with a 2-inch pipe

absorbing the whole yield of the river. He had never known his pump take all the water before. On four occasions he had seen the pipe leading from the Albion Spring to the river perfectly dry.

By Mr. Juta: He took his water from the mill-race. There were a garden and a conservatory on his property now which were not there before.

Mr. J. F. J. Wrensch, one of the plaintiffs, said he owned a farm of about eighteen acres at Observatory, and had known the river for about thirty-five years. He had used the water of the river since 1881, but in 1891 he got no water at all. He formerly kept a dairy, but had to cease that business on account of the company's operations resulting in the restriction of the water supply. Before the company's operations at the Albion Spring his sluice filled in twenty-four hours, but after they commenced it would not fill in six days. On February 19 and March 4, 1891, he saw the river perfectly dry. He had never known such a condition of things before. He had lost fully £200 a year by the loss of his dairy and garden. Of recent years there had been much less land put under cultivation on the river.

Mr. J. C. Wrensch, brother of the last witness, gave evidence of a similar nature, and said that by the operations of the company in 1890-91 he considered he was a loser by £100.

Willem Haupt, gardener with Mr. J. H. Reid, said that until last year he had plenty of water for gardening, but that year his supply was almost completely cut off. He got a good supply on Sundays, but not on other days.

James Barrall, head gardener with Mr. Anderson, gave similar evidence, and added that thirteen or fourteen years ago he used to hear the water running down the sluice as over cascades.

Samuel Woodhouse, foreman in the employ of Mr. Charles Ayres, seedman and florist, stated that Mr. Ayres's sluice was erected at the end of February, 1891. Formerly water was obtained from the Liesbeek River. Owing to the withdrawal of water Mr. Ayres suffered serious damage last year, the loss amounting to over £100.

By the Chief Justice: On two days during the present season there had been no water for irrigation.

Thomas Little, forage dealer, Newlands, said he had two wells on his property. The wells gave a strong flow of water until November, 1889, when they dried up. He inspected the Liesbeek River on the 10th April last, and found the water lower at the bottom end than at the top. He attributed this to suction operations.

By Sir T. Upington: Mr. Stewart sunk a pit near his well in September, 1889, but he did not think that this pit tapped his well.

By the Chief Justice: He had not yet decided whether he should bring an action against the defendants for depriving him of water.

Thomas B. Price, residing at Westerford between the Albion and Westerford Springs, said the well on his property dried up last year. It was dry, in fact, when he went there in September, 1890. He deepened the well to the extent of 7 feet, and got a small stream. Since then he had sunk a further 6 feet—to a total depth of 24 or 25 feet—and now had an ample supply of water.

Jacobus Fink, cart-driver, residing between the Albion and Westerford Springs, said his well became very dry in February last year. Before the Albion Spring was deepened there was an ample supply.

Thomas Moff, a retired well-sinker, said he had known Westerford Spring for thirty-five years, and until recently it had a strong flow of water.

Thomas C. Kerstbach, Thomas Cloete, and John Carnier gave evidence as to recent diminution of water in the Westerford Spring.

William A. Batchelor, secretary to the Rondebosch Municipality, said the Westerford Spring failed in January, 1890, and at the present time the water did not flow so strongly as formerly. Before pumping operations commenced the spring never ceased to flow.

Charles Eustace Pillans, Rosedale, Rosebank, said last year there was less water in the Liesbeek River than he had known for the last twenty-five years. He had not sufficient water for his garden last year. He did not believe the lack of water at his property was due to the cultivation of more land further up.

Charles Pillans, aerated water manufacturer said he had never known the river to be so empty as last year, or so foul.

Christopher Mostert stated that in January, February, and March last year the river was very dry. He was not a party to the present action; he had no time to attend the meetings of the syndicate.

John Robinson Reid, of Charlie's Hope, stated that the former owner of the place, Ecksteen, used more water from the river than was now taken.

This closed the case for the plaintiffs' evidence, the further hearing being postponed until Thursday.

SUPREME COURT.

TUESDAY, JANUARY 12.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice SMITH, and
Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

PAARL FIRE ASSURANCE COMPANY V. HESS.

Mr. Molteno moved for provisional sentence on a mortgage bond of £400, with interest at 6 per cent.

Provisional sentence was granted.

GERBER V. STANDER.

Mr. Molteno moved for provisional sentence on a judgment of the Resident Magistrate's Court for £4, with £1 10s. 5d. costs.

Provisional sentence was granted.

MCCAETHY V. STANDER.

Mr. Molteno moved for provisional sentence on a judgment of the Resident Magistrate's Court for £4 10s., with 19s. 1d. costs.

Provisional sentence was granted.

EATON, ROBINS AND OTHERS V. LAX.

Mr. Tredgold moved for final adjudication of the defendant's estate.

The order was granted.

PRITCHARD V. MORSE.

Mr. Molteno moved for provisional sentence on a bond of £50, with interest.

Provisional sentence was granted.

MACINTYRE V. DE JAGER.

Mr. Searle moved for provisional sentence on a promissory note for £100.

Mr. Juta appeared for the respondent, and read his affidavit to the effect that the note was signed under a misunderstanding, deponent believing that it was passed not to applicant privately, but in his capacity as representative of the trustees in the estate of one Van Wyk.

Mr. Searle read a lengthy answering affidavit which travelled over the business dealings between the parties, and according to which there was due to deponent £99 16s. 5d.;

Mr. Juta pleaded that as applicant had no cessation of action from the trustees he could not sue on the note.

The Chief Justice said it would have been better if Mr. McIntyre had proceeded in a more regular manner, but there was no possibility that the trustees would make any further claim against the respondent, and under those circumstances provisional sentence would be granted.

KOLSCH V. MUHSFELDT.

Mr. Graham moved for provisional sentence on a promissory note for £18 with interest.

Provisional sentence was granted.

SHARP'S EXECUTOR V. HYLAND.

Mr. Juta moved for provisional sentence on a promissory note for £35, less £5 paid on account. The note was passed in 1886.

The order was granted.

S.A. ASSOCIATION V. RAUTENBACH.

Mr. Thorne moved for provisional sentence on a bond for £27.

Provisional sentence was granted.

TRUTER V. TRUTER.

Mr. Shiel moved for judgment under rule 329 for the sum of £80, being the amount of an allowance due by defendant to plaintiff in terms of a certain deed of separation entered into between the parties.—A confession of judgment was filed.

KEY V. JOUBERT'S EXECUTORS.

Mr. Graham moved for judgment for a sum of £60, under rule 329.

Judgment was granted.

REHABILITATIONS.

On motion from the bar the rehabilitation of the following insolvents was granted: Joseph Maybery Richard James Stupart, Michael Cornelis Wolff, and Johannes Petrus Kloppe.

GENERAL MOTIONS.

IN THE MATTER OF MARTHA M. G. VAN DER MERWE, AN ALLEGED LUNATIC.

Mr. Tredgold moved for the appointment of a *curator ad litem* in proceedings about to be instituted to have the said Van der Merwe declared

of unsound mind, and incapable of conducting her affairs. Counsel added that there was a sum of £97 due to the lunatic in the hands of the Master.

The order was granted, and the Court allowed the evidence to be taken on affidavit at Piquetberg, the Resident Magistrate of that place to be commissioner, and to forward to the Court a full report as to the condition of the alleged lunatic, and to suggest a fit and proper person to act as curator of the person and property of the alleged lunatic.

IN THE INSOLVENT ESTATE OF THE LATE J. WOLSTENHOLME.

Mr. Shiel moved to make absolute the rule nisi for the acceptance of the resignation of his office of trustee to the said estate of Servaas van Nickerk.

The order was granted.

IN THE MATTER OF M. A. CHISM.

Prodigal—Curator bonis—Rule nisi.

Mr. Juta moved for the appointment of a curator for the purpose of taking charge of the person and property of the said Margaret A. Chism, who, by reason of her intemperate habits, it was alleged, was unfit to manage her business and attend to her children. Counsel stated that Mrs. Chism was addicted to extreme intoxication and used violence to her children, and that in their interests it was desirable to appoint a curator for the management of the estate. Affidavits were also read to the effect that she was an irreclaimable drunkard. By her late husband's will she was sole heiress and executrix of the estate.

The Chief Justice asked what precedent there was for granting the application.

Mr. Juta: On the principle that Mrs. Chism is a prodigal, and consequently can be placed under curatorship; also that the Court, as upper guardian of the children, would protect their interests. Counsel referred to "*In re Filmer*" (Buch. 1875, p. 2), and "*The Master v. Lehman*" (4 E.D.C. 308).

The Chief Justice said that was so, but he desired to see in what manner the Court could deal with the property.

Mr. Justice Smith said he was under the impression that the Court could place under restraint any person who was a prodigal.

The Chief Justice said he had a strong impression that the Court had exercised this power on previous occasions, but no case had been cited, and they must go by what they knew to be the common law of the country. (His lordship referred to Van

der Linden, 1. 5. 8.) The Court possessed large powers in these cases, and certainly this appeared to be a case in which those powers ought to be exercised. This lady, apparently, had children, all minors; she was the sole heiress of her husband and was not only prodigal and wasteful, but, according to affidavit, ill-treated the children, and was personally dangerous to them, all that being caused by her unfortunate habits of intoxication. They thought that if there were no precedent they ought to establish one. The Court would therefore grant a rule nisi calling on Mrs. Chism to show cause, on Thursday, why she should not be declared a prodigal and interdicted from dealing with her property, and why a curator should not be appointed to manage the estate, the rule to operate as an interdict in the meantime, restraining her from dealing with her property.

Mr. Thomas Little to act as curator bonis in the interim.

THE CAPE STOCK-FARMING COMPANY.

Sir T. Upington moved for an order in terms of the first report of the official liquidator. Counsel stated that the matter was before the Court some time ago, when Mr. G. Vardy, of Port Elizabeth, raised strong objections to the report of the official liquidator; but subsequently he had withdrawn all objection, and under those circumstances counsel asked that the costs of opposition should be borne by Mr. Vardy.

The Chief Justice: How is he now before the Court?

Sir T. Upington: Because the case was before the Court some time ago, and was adjourned at Mr. Vardy's request, he then being represented by counsel.

The Chief Justice said the Court was not inclined to discourage bona fide objections to liquidators' reports, but in the present case the objection appeared to have been pushed rather far, and the Court would therefore confirm the prayers of the report, in respect of which the present application was made, the costs of opposition to be borne by Mr. Vardy.

IN THE ESTATE OF THE LATE ADRIAN G. A. WESSELS.

Mr. Graham moved for authority to the executors to raise a loan on mortgage of the landed property on the estate, to enable them to satisfy a judgment of this Court in a suit in which the said estate was defendant.

The order was granted.

IN THE MATTER OF ROBERT JAS. CONWAY, AN ALLEGED LUNATIC.

Mr. Giddy moved for the appointment of a curator ad litem in proceedings about to be instituted by

the Master to have the said Conway declared of unsound mind and incapable of managing his affairs. Counsel stated that there was £862 lying to the credit of Conway in the Guardians' Fund, whilst he was also possessed of certain landed property in Cape Town.

The order was granted, and Mr. Watermeyer appointed curator.

THE KNYNSA CONSOLIDATED GOLD-MINING COMPANY.

Mr. Juta presented the first report of the official liquidator, and moved that it lie for inspection for the usual period. The Court granted the application. Publication to be made in the *Gazette* and in the *Kynsa Herald*.

THE UNION BANK, IN LIQUIDATION, V. DU TOIT'S EXECUTRIX.

Mr. Schreiner moved for an order amending the list of contributories by placing thereon the executrix testamentary of the late Jacobus J. du Toit, in respect of twenty shares registered in the name of her husband, and declaring her liable for the calls thereon up to the amount distributed by her in her said capacity.

The order was granted.

IN THE ESTATE OF THE LATE CORNELIS J. BUISSINNE.

Mr. Webber moved to make absolute the rule nisi for the cancellation by the Registrar of Deeds of certain mortgage bond for £60 passed in favour of one Thomas King on the 21st April, 1865.

The order was granted.

VAN REENEN V. VAN REENEN.

Mr. Juta moved to make absolute the rule nisi restraining the respondent from selling and disposing of his property pending the decision of the action instituted against him by his wife for separation, maintenance, and custody of the children. It appeared that there were six children of the marriage, and that defendant had notified his intention of selling his property and leaving the Colony.

Mr. Searle appeared for the respondent, who denied that he had any intention of leaving the Colony. His present house was too large, and he desired to sell it and pay his debts and live in a smaller one.

The order was granted upon the undertaking of counsel that the plaintiff would go to trial on February 2.

MARKS V. KOSKE.

Mr. Juta moved to make absolute a rule nisi admitting applicant to sue *in forma pauperis* in an action for recovery of articles pledged, or for damages.

The order was granted.

PETITION OF BRIDGET MCEWAN.

Mr. Webber moved to make absolute the rule nisi for the payment to petitioner of a certain sum of money out of the estates of her father and mother, and awarded to her husband and placed in the Guardians' Fund to his credit.

The order was granted.

ODENDAAL V. ODENDAAL.

Mr. Watermeyer moved to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for divorce by reason of his adultery.

The order was granted.

PETITION OF WILLIAM PATTINSON.

Mr. Tredgold moved to make absolute the rule nisi for cancellation in the Debt Registry of certain two mortgage bonds passed in 1846 and 1851 in favour of the assigned estate of John Norton and the superintending guardians of the said Pattinson's minor children respectively.

The order was granted.

HARVEY V. HARVEY.

Mr. McLauchlan moved to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for divorce by reason of his adultery.

The order was granted.

IN THE INSOLVENT ESTATE OF SAM SOODIN.

Mr. Schreiner moved for an order authorising the Master to call a special meeting of creditors of the said estate for the purpose of electing a trustee.

The order was granted.

REGINA OF V. ILIFFE.

Master and servant—Act 18 of 1873, Section 14—Contravention—Conviction—Appeal.

Mr. Schreiner appeared for the appellant and Mr. Giddy for the Crown.

This was an appeal from the conviction and sentence of the Resident Magistrate of Victoria

West in proceedings instituted under the Master and Servants Act, 1878.

The appellant, Mrs. Illiffe, was charged before the Magistrate with having contravened Act 18 of 1873, Sec. 14, in that upon or about the 9th day of December, 1891, she wrongfully and lawfully withheld certain wages due to one Thomas William Pepper.

The appellant was found guilty, and sentenced to pay £8 15s., each party to pay his own costs. The appeal was raised purely on the evidence, the appellant's contention being that the judgment was wholly against the weight of testimony, and that if the Court found that Pepper had been wrongfully dismissed appellant was not responsible, the dismissal having been made by her manager.

It appeared from the evidence that Pepper was dismissed by appellant's manager (Mr. Illiffe) on the 9th December.

A tender of wages due to that date was made to Pepper, the latter, however, declined to accept the sum offered and in consequence proceedings were taken against Mrs. Illiffe.

Mr. Schreiner.—The whole proceedings are premature as the servant should have awaited the termination of the month. He was never refused his board and lodging.

The Section 14 of Act No. 18 of 1873 recognises the offence of withholding wages due without reasonable and probable cause for believing them not to be really due.

Wages are only due as the reward for actual service, the claim for damages for wrongful dismissal is not a claim for wages.

There is nothing in the section to show that a master can be prosecuted for wrongfully dismissing a servant without giving him compensation.

That wages due are to be distinguished from damages for wrongful dismissal appears from the principle that if a servant is wrongfully dismissed and immediately obtains other employment the wages earned in that employment are allowed to diminish the amount which can be recovered in an action for damages for wrongful dismissal.

In the present case Mr. Illiffe tendered on the 9th December, 1891, the day of the alleged dismissal, the amount of wages then earned.

The servant did not wait till the expiration of the month, tendering his services meanwhile.

Something might in that case have been said for the contention that he had earned wages for the entire month.

But he immediately complained that the entire month's wages were wrongfully withheld.

The Magistrate therefore erred in convicting and giving judgment for the amount of the entire month's wages.

The section empowered the Magistrate in these

proceedings on conviction to give judgment for wages due, not for damages for wrongful dismissal.

On the facts Mrs. Illiffe was never asked by the servant to pay any wages. She cannot therefore be accused of the criminal offence of withholding wages which were never demanded.

The wrongful act of her husband, assuming that the dismissal was wrongful, cannot make her guilty.

Mr. Giddy *contra* referred to the case of *Baker v. Dormer*, 1 Juta, 268.

The Chief Justice gave judgment. He said that in his opinion the Magistrate in this case had mistaken the law. The action was brought under the 14th section of the Act of 1873, and was really a criminal action although a civil remedy was given in addition to the criminal one. If the plaintiff had intended suing for damages for breach of contract, his proper course would have been to bring a civil action for damages. That he would have brought in the Magistrate's Court and would not have put the criminal law in motion. Having put the criminal law into operation it lay upon him clearly to prove that the case against the defendant came under that special section of the Act. In his opinion the case did not come under that section at all. There could be no withholding of wages *qua* wages until the wages were really due and had been earned. He was not prepared to say that a servant had not earned wages when he had been ready and willing to do his work. Therefore, in this case, if the plaintiff had waited until January 1, and in the meanwhile had said to the master that he was there, ready and willing to do his work, he was satisfied that on January 1 the plaintiff would have been entitled to proceed under the 14th section of the Act, and would have earned the wages, because he was ready to do the work. He thought that view might be reconciled with the judgment of the Court in the case of "*Baker v. Dormer*." In that case there was a dismissal, and a week afterwards the action was brought for £8. The Court awarded £4, that amount being due for wages earned during the week. That £4 was earned *qua* wages, inasmuch as the plaintiff in that case was ready and willing during that week to do his work, and the withholding of the £4 wages was a criminal offence under the 14th section, and entitled the Magistrate to give judgment against the master under that section. He thought the judgment might be supported by the principle that he had laid down, and applying that principle to the present case, it was quite clear that the plaintiff was entitled to wages up to the 9th of December. If he sued before the end of December he could only sue for damages for breach of contract and not for wages, and the 14th section did not, in his opinion, apply. The

judgment, therefore, would have to be reversed, but inasmuch as the defendant tendered the sum of 19s. 6d. the judgment of the Court must be for the sum of 19s. 8d., without any order as to costs in this Court or in the Court below.

Mr. Justice Smith was not prepared to differ from the judgment of the Chief Justice, but was afraid the effect of it would be to do away, to some extent, with the effect of the 14th section of the Act.

Mr. Justice Buchanan concurred with the judgment of the Chief Justice

[Appellant's Attorney, W. E. Moore.]

In re THE APPLICATION OF MR. H. C. LEE.

Mr. Juta mentioned this application, which was that of Mr. H. C. Lee for admission as a notary and conveyancer. When the matter was previously before the Court, counsel applied that the year of service within the Colony should be dispensed with in view of service in England, and a postponement was then ordered to allow of inquiries being made as to the precedents in such cases. Mr. Juta now stated that he had made inquiries, but could not find that in any case the year of service in the Colony had been dispensed with.

DU PLESSIS' EXECUTORS V. DU PLESSIS' EXECUTOR.

Will—Construction—Special case.

Mr. Searle appeared for the plaintiffs, and Mr. Schreiner for the defendant.

This was a special case, the plaintiffs being the executors testamentary of the estate of the late Johanna Maria Dorothea du Plessis (born Vogelgezang), appointed under a will made by her on or about the 21st July, 1882, and the defendant being the executor dative of the estate of the late Elizabeth Maria du Plessis. J. M. D. du Plessis died on the 22nd April, 1890. The said Johanna M. D. du Plessis was married in community of property to one P. J. du Plessis, with whom she made a mutual will on or about May 27, 1858. The said P. J. du Plessis died on or about the 4th November, 1859. Under the said will the survivor was appointed heir and executor, upon certain conditions as to maintenance and education of the children of the marriage. The defendant is the executor dative of the estate of the late Elizabeth Maria du Plessis, sister of the said P. J. du Plessis. She made a will on the 17th October, 1884, and died on the 2nd December of the same year. Under her will the said Elizabeth Maria du Plessis made the following bequest: "To my brother, Philippus Jacobus du Plessis, now

married to Johanna Maria Vogelgezang, my house and erf, situate in the so-called Brauwerstraat, in the valley of Tulbagh, district of Worcester, with all the fixtures thereon, on this condition and stipulation however, that the said house and erf shall not be sold, but after the death of the said two shall devolve to their daughter, Johanna Maria du Plessis, and in case of predecease to her lawful descendants by substitution." After the death of the said Elizabeth Maria du Plessis, the said P. J. du Plessis took possession of the property in the above bequest mentioned under the terms of the said will, and remained in possession thereof until his death, and after his death his wife remained in possession until her death. The said Johanna Maria du Plessis died on the 18th December, 1880, leaving no lawful descendants. The house and erf bequeathed as aforesaid still remain, and have always remained, registered in the name of the said Elizabeth Maria du Plessis. The plaintiffs contended that the estate of the late Johanna M. D. du Plessis (born Vogelgezang) was entitled to the said house and erf, and the defendants contended that the estate of the late Elizabeth Maria du Plessis was entitled to the house and erf. Wherefore the parties prayed for judgment each in terms of their respective contentions, and that the costs of the present suit might be ordered to be paid out of the proceeds realised by the sale of the said house and erf.

After argument,

The Chief Justice gave judgment to the effect that the property formed part of the estate of P. J. du Plessis. Costs would come out of the proceeds of the property.

[Plaintiff's Attorney, C. C. de Villiers; Defendant's Attorneys, Messrs. van Zyl & Buissinne.]

SUPREME COURT.

WEDNESDAY, JANUARY 13.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

METROPOLITAN AND SEA POINT RAILWAY COMPANY V. THE COMMISSIONER OF CROWN LANDS AND PUBLIC WORKS.

Railway Company—Statutory rights—Expropriation of Crown land—Consent of Commissioner—Condition precedent—Act 23 of 1889—Construction.

Sir T. Upington, Q.C., and Mr. Juta for the plaintiff company; the Attorney-General (Mr. Innes, Q.C.), Mr. Searle and Mr. Giddy for the defendant.

The facts of the case will appear from the pleadings. The declaration was as follows:

1. The plaintiff company is a duly-registered company under the Limited Liability Act. The defendant is the Hon. James Sivewright, in his capacity as Commissioner of Crown Lands and Public Works, and as such representing the Colonial Government, and as such is the proper party to be sued in this action.

2. By Act No 23 of 1889, section 1, the plaintiff company is authorised and empowered to construct, equip, maintain, and work a railway from a junction with the Western line of railway at or near the Cape Town railway goods-station, and thence, *via* the Dock-road, to Sea Point, in accordance with the plans duly lodged with the Clerk of the House of Assembly, and by section 2 of the said Act it is provided that the said railway shall commence at such a convenient junction point with the Western Railway System at Cape Town as may hereafter be agreed upon between the Commissioner of Crown Lands and Public Works and the directors of the said company, and thence following the line of the Dock-road over and along the Colonial Government Railway line or portion thereof, and by the said Act the aforesaid plans are incorporated into the said Act.

3. The said Western line of railway and the Cape Town railway goods-station form parts of the Western Railway System which belongs to the Colonial Government, and the termini thereof at Cape Town are a passenger-station and a goods-station and yard, which goods-station is the station mentioned in the said Act. A copy of the portion of the plan lodged with the said Clerk of the House of Assembly relevant to this suit is herewith annexed, and it shows the said passenger and goods-stations and the said yard, and it shows the railway of the plaintiff company beginning at a point at or near the said goods-station, and also a station of the said company at or near the said point. The land upon which the said line and station of the company are shown, and the land about and around the said station is Crown land.

4. By section 6 of the said Act all the powers bestowed upon the Commissioners of Roads under Act No. 9 of 1858 in regard to the taking and acquiring lands and materials necessary for the making and repairing of any main road, are bestowed upon the directors of the plaintiff company, provided that the extent of land taken for the railway shall not exceed in width 80 feet for the formation of the line and sufficient additional width required for the slopes, drainage, station, approach roads, and all other works, matters, and things

which may be requisite or necessary for the efficient construction, maintenance, and working of the said railway.

5. The plaintiff company is desirous of constructing, equipping, maintaining, and working a railway from a junction with the Western line of railway at or near the said Cape Town railway goods-station in accordance with the said plan, and of establishing the station as shown on the said plan, and of exercising such powers granted under the said 6th section as are necessary and requisite as aforesaid, and to lay down the sidings and the like; necessary and incidental to a junction and station, but the defendant has refused to agree to any junction whatever with the Western line of railway, and has refused to allow the plaintiff company to run their engines, carriages, and trucks into the said yard, or establish the said station as shown on the said plan, and denies that the plaintiff company has any right to effect a junction with the said line of railway, or to run their engines, carriages, and trucks into the said yard, or to establish any station of any nature whatever as shown on the said plan, or to exercise any of the powers granted under the said 6th section with regard to the said Crown land, or to lay down any sidings and the like necessary and incidental to a junction and station.

By reason of the said wrongful refusals and conduct of the defendant, as set out in paragraph 4, the plaintiff company has suffered damage to the extent of £2,000.

Wherefore the plaintiff company prays for an order declaring

(a) That the plaintiff is entitled to effect a junction with the Western line of railway.

(b) That the plaintiff company is entitled to run their engines, carriages, and trucks into the said yard as shown on the said plan.

(c) That the plaintiff company is entitled to establish a station as shown on the said plan.

(d) That the plaintiff company is entitled to exercise the powers given under the 6th section in respect of the said Crown land.

(e) That the plaintiff company is entitled to lay down such sidings and the like as may be necessary and incidental to a junction and station.

(f) The plaintiff company claims the sum of £2,000 as and for damages as aforesaid.

(g) That the plaintiff company may have such other and further relief as to this honourable Court may seem meet, with costs of suit.

DEFENDANT'S PLEA.

1. The defendant admits paragraphs 1 and 4 of the declaration.

2. He denies that the true meaning and effect of section 1 of Act 23 of 1889 is as stated in paragraph 2, or that by the said Act the plans mentioned in

the said paragraph are incorporated in the Act, and he craves leave to refer to the said Act for the terms of sections 1 and 2 thereof, whereunder the said plans are to be acted on only in so far as they are unaffected by the provisions of the said Act.

3. As to paragraph 3, he says that the Western Railway System includes the railway line to the Cape Town Docks, and that according to section 2 of the said Act the railway of the plaintiff company shall commence at such convenient junction point with the Western Railway System at Cape Town as may be agreed between the plaintiff company and the defendant.

4. He admits that the plan annexed to the declaration is a correct copy of the plan lodged in the House of Assembly, and in the said Act referred to, and that the land upon which the Cape Town goods-station of the Cape Government Railways stands is Crown land, and that there is also Crown land adjoining; save as above he denies the allegations in paragraph 8, and he craves leave to refer to the copy of the plan for its description.

5. He says that the plaintiff company are not entitled under the said Act to insist on their station being in the goods-station yard of the Cape Government Railways.

6. As to paragraph 5, defendant denies that he has refused to agree to any junction whatever with the Western line of railway; he says that a junction has already been made by the defendant in accordance with the wish of the plaintiff company and at their expense, and that the plaintiff company have run an engine and train over their line and on to the Wynberg line of Cape Government Railways.

7. The defendant admits that he has refused to allow the plaintiff company to run engines, carriages, and trucks into the goods-yard, or to establish a station there; he says that it would be impossible with regard to the safety of the public and the proper management of the Cape Government Railways, that the plaintiff company should do so; and that the said goods-yard and station are not sufficiently large for the requirements of the Cape Government Railways.

8. The defendant denies that the plaintiff company has any rolling-stock belonging to it, and says that he has lent them certain rolling-stock for a temporary purpose.

9. The defendant denies that by any acts of his the plaintiff company has sustained damage in the sum of £2,000 or any portion thereof.

10. With regard to the prayers of the declaration, the defendant says: As to (a), that there is already a junction at a point in the Dock-road at the lower end of Bree-street; as to (b) and (c), he denies the rights of the plaintiff company as claimed; as to (d) and (e), that plaintiff is only

entitled to exercise the powers therein claimed, in accordance with the provisions of the said Act; as to (f), he denies the damage.

Wherefore he prays that the claim may be dismissed with costs.

PLAINTIFF'S REPLICATION.

1. As to paragraphs 3 and 6 of the defendant's plea, the plaintiff says that he denies that the Western Railway System mentioned in sections 1 and 2 of the Act No. 23 of 1889 includes the Government railway line to the Cape Town Docks. By the terms of the said Act, and the said plan, the plaintiff's line of railway commences at a junction with the said Western Railway System, thence over portion of the Government railway line to the Cape Town Docks, thence alongside portion of this last-mentioned line, which it crosses at a spot at or near the bottom of Bree-street, Cape Town. By arrangement between the parties, temporary points for the purpose of ballasting the plaintiff's line were put in the said Dock railway at a spot at or near the bottom of Bree-street, and on one special occasion by arrangement between the parties, for a special purpose, the plaintiff ran an engine and train by means of those said points over the said Dock line, thence upon the Western system of railway, and thence on to the Wynberg line of Cape Government Railways; but the said temporary points do not constitute the junction mentioned in the said Act, nor was it agreed upon, or intended to be the junction in terms of the said Act. Save as aforesaid, and save as in as far as the plea admits any of the allegations in the declaration contained, the plaintiff denies the allegations in the plea contained, and joins issue with the defendant thereupon, and again prays for judgment with costs.

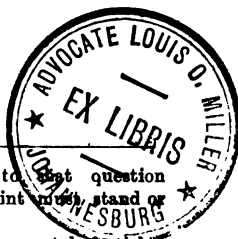
Upon these pleadings issue was joined.

Mr. Percy Ashington, C.E., engineer to the company, gave evidence that the Government had permitted a junction at the foot of Bree-street, but that it was merely temporary, for ballasting purposes. That junction, however, was wholly insufficient for the general purposes of the company. It was necessary to have what was known as a loop, otherwise engines could not be taken from one end of the line to the other.

By the Attorney-General: The company would not require a very large amount of room inside the goods-yard, but of course a loop of sufficient length would be wanted. He did not agree with the statement that the Government's buildings and rails would be displaced if the company went inside the goods-yard.

For the defence,

Mr. C. B. Elliott, General Manager of Railways, said he was cognisant of the correspondence which had passed between the parties, and of the condi-



tions under which the goods-yard was worked. He could tell the Court what the effect would be if the company were allowed to come inside the goods-yard.

Sir T. Upington objected to that question being answered.

The question being allowed, witness said that if the company got what was asked for it would mean that the goods traffic could not be carried on. He would not say that the traffic could not be carried on for twenty-four hours, but he would say that whilst it might be carried on when at a low ebb for as much as twenty-four hours, it could not, when the traffic was large, be carried on twelve hours if the company were allowed to come inside the goods-yard. There was not enough room for the goods traffic at present. For years he had been urging the Government to give more room, and there was now under consideration a scheme for expropriating Strand-street property, and enlarging railway accommodation, at a total cost of £150,000. Whilst he was away in England two plans were submitted to the company as proposals to which the Government would not object. The gradient coming from Bree-street to the Dock-road was 1 in 40, and it would be very dangerous to have trains coming down a gradient like that to a street where the traffic was heavy, especially on mail days. For that reason the Railway Department wanted the line raised for a considerable distance, and he had proposed that the company's line should not cross the Government's line at all, but should let it go straight to the Docks.

By Mr. Justice Smith: He had to take things as they were, but instead of the company joining the Government's line at the place proposed, he suggested a line parallel to that one, and that there should be two connections, one on each side of the platform, so that the company's engine could go round the platform, on to the Government side, at both sides of the platform, without crossing where the traffic was so very constant. He had objected to the company's engines coming right down on to the Government lines, because he felt that if they did there would be frequent accidents.

Cross-examined by Sir T. Upington: The scheme to which he had urged the attention of Government had been discussed during the past eight or ten years, but one of his proposals was made a few months before the present Government came into office, when he made a proposal of a very definite character. Long before 1889 the need for more accommodation existed. In the month of November last negotiations in connection with the Sea Point Railway were taken out of his hands, but that was in consequence of the company commencing an action against the Government.

The Attorney-General: What comprises the Western System of Railways

Sir T. Upington objected to that question being answered, and said the point must stand or fall by statute.

The Chief Justice: Well, can you take a ticket from Adderley-street to the Docks?

Witness said that on special occasions the department had carried passengers.

Mr. Justice Smith: On the occasion of a dance on the Dunottar, or something of that sort, but not regularly?

Witness said that was so.

The Chief Justice: You can hardly call that part of the Western System?

Witness said he thought he should be able to show that provision was made for the Dock line with the rest of the Western System, which extended from the Docks to Vryburg. He should be very sorry if that piece were taken out of the Western System. Sixteen trains a day were run between Cape Town and the Docks.

By the Chief Justice: It was true that the proposals he made in November were contingent upon the Town Council giving consent, and as he wished to act in a friendly spirit towards all parties, he called on the Mayor and explained the plan to him, and the Mayor said that from what he knew the feeling of the Town Council would probably be in favour of it. He was not here when the case between the Town Council and the Railway Company was tried, but there were circumstances connected with the case which led to the opposition offered to the company by the Town Council. If the Town Council would not consent to his proposal, he suggested that the company should construct a line from the Fish Market to the Docks, by which means the safety of the public and the railway would be secured. He believed that if the Council were approached in a proper spirit the difficulty would disappear.

Mr. Justice Buchanan: Assuming the Town Council objects, where are the company to go?

Witness thought they could go through the plantation.

Mr. Justice Buchanan: And if the Harbour Board object?

Witness said they would not object. He knew that positively, as one of the members of the Board. There would be no objection on the part of the Council or the Harbour Board if the company would only carry out the necessary works. It was purely a question of £ s. d.

By the Chief Justice: The Railway Department was cramped for room in 1889. He saw the plans attached to the company's Bill in that year, and as soon as he did so objected to them. If the objection had been pressed the Bill would have been thrown out for the year, so the Government consented to the passing of the Bill, but solely on the condition that the company kept to the north side of Adderley-street, opposite to the goods-station,

The Chief Justice : There is no plea to that effect.

The Attorney-General said there were letters to that end, and he was going to apply to put them in.

By Mr. Justice Smith : It was quite possible that all along it had been contemplated that this line should eventually be joined to the Government Railways, and if the department got the ground that was wanted it would doubtless allow of such a step being taken.

Mr. A. H. Harper, Goods Superintendent of the Cape Government Railways, deposed that the piece of line known as the Dock Railway began at the Docks and ran right through the goods-station and joined the main line at the Castle yard. It did not come into the passenger-station at all. He had heard the evidence of Mr. Elliott, as to the difficulty that would be caused if the company were allowed to come inside the goods-yard, and he corroborated it. He was too cramped for room as it was, and could not, as superintendent, be responsible for the due regulation of the goods traffic if the company were allowed to come inside the goods-yard. The traffic was very large now, as much as 15,000 tons per month having to be dealt with. If the company came in an extra siding and platform would be required, and there was no room for them. If the company were allowed to come in some of the existing rails and platforms would be displaced, and there was no room for others. It was only by employing the best men, and exercising the greatest supervision, that the goods traffic was at present controlled.

By Sir T. Upington : If they had more room of course they could do more work. It was a pounds, shillings, and pence question. They needed more room, but were carrying on very well at present, though they could not do so if any ground were taken from them. If the company came in it would so hamper the goods work that it could not be carried on for twenty-four hours. It was true that the Cape Town refuse was loaded there, but on a high-level platform, which was also used for the loading of explosives and heavy articles. He was loading 400 logs, 45 feet long, for Johannesburg at that place, and recently loaded 11,000 cases of dynamite there.

By the Chief Justice : The vacant space between the goods-yard and the sea was not over 30 ft.

By Mr. Justice Smith : There was no other spot in the goods-yard where the refuse could be loaded but that in which it was loaded now.

Sir T. Upington then addressed the Court on behalf of the plaintiff company. Counsel pointed out that during the whole of the long negotiations nothing had been done which in any way deprived the company of its legal rights under the Act, the proviso of which had the effect of strengthening the case of the plaintiffs. It was clear, from the provisions of the Act, that the plans were incor-

porated with the Act, and by the plans it was so perfectly clear as to need no emphasising that the plaintiff company had the right to run into the goods-yard. That being so, there was nothing in the world which allowed the Commissioner of Crown Lands or anyone else to vary the Act, except so far as the proviso went, and the proviso simply said that the company should not erect buildings inside the goods-yard unless with the consent of the Commissioner. It was clear from the proviso that the company had the right to enter the goods-yard, else why was prohibition inserted, with regard to the erection of buildings ? The company did not ask the Court to say that they had the right to erect buildings ; all they wanted was an order authorising them to enter the yard, and that the sidings and other appurtenances necessary should be granted in terms of the Act. He had no doubt at all that if the Court made an order in terms of the declaration a settlement would be come to and room made for the company, for it was clearly to the advantage of everybody that there should be a connection between the Sea Point and Wynberg line, and that trains should run through. As to the suggestion that the Dock line formed part of the Western System he did not think it necessary to refer at any length to that point, because it had not been pressed strongly, and could never be sustained far a moment. The whole of the correspondence showed that when the company commenced the construction of their line the Railway Department grew uneasy, and saw that it might cause some inconvenience. Then negotiations went on for a long time as to the spot where the terminal station of the company was to be. He submitted that on the true construction of the Act the Legislature intended that the plaintiff company should have the right to run over the Government line, and not only that, and the right to run into the goods-station, but the right to expropriate the necessary land for their siding, and he contended that on all points the plaintiffs' case had been fully proved. Counsel referred in argument to "*Cotter v. Midland Railway Company*" (2 Philips, 469) ; "*Ware v. Regent's Canal Company*" (L.J., Equity, vol. 28, p. 158), and "*Hodges on Railways*" (fifth edition, p. 421).

The Attorney-General, in his argument for the defendant, observed that with regard to the plaintiffs' claim of running powers over the Government Railways that was a most valuable privilege, and it would have to be proved that it was given, but running powers could only refer to that part of the Government line which lay between the point where the metals of the company touched the metals of the Government Railways and Sea Point. The plaintiffs could only use the Government line between their terminus and Sea Point, and their terminus would have to

be agreed to by the Government. What the Government would have to do, in order to accommodate the company if the Court found that the plaintiffs' case was proved, would be to expropriate a piece of land at enormous cost, and the taxpayer would have to pay £150,000 to oblige the Sea Point Railway Company. The Act and the plan were on a piece—utterly unintelligible.

The Chief Justice remarked that in previous cases which had come before the Court they had held companies strictly to their plans, and if the company were held strictly to their plan they should also have the benefit of that plan. If the plan showed that they were entitled to a station then they were entitled to get that station. If the proviso said that the company should not have buildings there, was not the Court bound to come to the conclusion that they could have everything else but buildings?

The Attorney-General contended that that was not so, and that the Act and the plans were hopelessly inconsistent. There was no power to compel the Commissioner to consent to give the company entrance to the goods-yard, so long as he acted *bona fide* and in the interests of the public. The Commissioner had acted in that spirit all along, believing that it would be highly disadvantageous to the general welfare if he allowed the company to enter the goods-yard. There was another important point for the Court to remember, and that was that until the present case was commenced the company never applied to enter the goods-yard at all. The company had many plans before it, but one after another they had to be abandoned, and then, as a last resource, they applied to be allowed to enter the goods-yard. The Harbour Board had offered to lease some land to the company for £10 a month, but the company only wanted to pay £5. Had they paid £10 this dispute might have been avoided.

Mr. Juta said that was not so, and that in respect of that very land the Town Council had commenced an action against the company.

The Chief Justice: This unfortunate company seems in a hard position between the Government and the Town Council and the Harbour Board.

The Attorney-General said he could not help saying that the company had only themselves to thank for their position. They had at first approached the Government and offered to adopt a raised line and a viaduct, if the Government would contribute part of the expense, and when that and other means failed, they had tried to enter the goods yard, where, he contended, they had not the smallest right to go. The Attorney-General concluded his argument by referring to an observation made by Mr. Justice Buchanan in the case of the Cape Town Council v. The M. & N. Ry Co. (1 C. T. L. R., 256).

Sir T. Upington briefly replied for the plaintiffs,

Cur ad vult.

Postea (Jan. 14.)

The Court delivered judgment.

The Chief Justice said. The question to be decided in this case was as to whether the plaintiff company had a right to place their Cape Town station within the goods-yard belonging to the Cape Government Railways. On behalf of the company counsel had admitted that the company had no right to erect or construct any buildings within the yard, but contended that the company had running powers over the line belonging to the Government, and that although they might have no right to place buildings there, they were entitled to put down passengers within the goods-yard, and for that purpose also construct a platform within the yard. Now that right could only be exercised in case the company had expropriated the land of the Government, and in his opinion it was perfectly clear from the whole tenour of the Act that the company had no right to expropriate land within the yard. He understood that his brother, Mr. Justice Smith, somewhat differed from the views he (the Chief Justice) intended to express, but he understood that he agreed in this, that the company had no right to expropriate the land. Well, in his opinion, if there was no right of expropriation, the whole claim of the plaintiffs fell to the ground. The mere possession of running powers to a point called "Zero" on the plan would be of no possible effect to the company, unless they had the right to put passengers there, but if the land adjoining the spot "Zero" did not belong to the company, then every passenger who was set down alongside the Government Railway would be a trespasser on Government land, and the Government would be entitled to warn him off the premises, so that the right would be purely nugatory unless it was accompanied by the right to put passengers down there. Looking at the Act of 1889, it seemed perfectly clear that the southern junction of the two railways should not be effected without the consent of the Commissioner of Crown Lands and Public Works. The second section said that the line should commence at a point to be agreed upon between the Commissioner and the contractors, and no such agreement had up to that time been entered into. There was no allegation or proof that the Commissioner was guilty of any *mala fides* in not coming to such an agreement, and therefore they must decide the case as if there were no agreement, and consider whether the company possessed the right to fix the southern junction without the consent of the Commissioner. It was clearly contemplated that the railway

should start, not from the northern, but the southern end, that the junction was first of all to be agreed upon, and that their running powers were to be given on the Dock line, up to the point where the Metropolitan and Sea Point railway turned off to Sea Point; but instead of that the company began at the southern side, and, having gone some distance along this common line, the question was where they were to stop. The junction had not been agreed upon, and the company found themselves in the present difficulty. If the company had first of all obtained the consent of the Commissioner to a junction point on the southern side the difficulty might have been avoided, but as it was he really doubted if the company possessed any running powers at all, in the absence of an agreement with the Government. Then came the first section, which referred to the plans and specifications. Now, in most of the cases the plans and specifications had gone to decide the rights of the parties, and if in that case they referred to the plans only there could be no doubt that the company had the right to go within the goods-yard. But the first section, after referring to the plans, said they should apply save and except as the said plans were inconsistent with any of the provisions of the Act, and then came also the important proviso that nothing in the Act should empower the company to erect buildings inside the goods-yard, or within the limits of the goods-station, without the consent of the Commissioner. Clearly there was prohibition of the construction of any building within the goods-yard without consent, and, as he had said before, without a building of some kind the power to run to the point "Zero" would be nugatory. Therefore, in his opinion the intention of the Legislature was clear that until the Commissioner consented there was no right to come within the goods-station for the railway purposes of the plaintiff company. The case had been argued for the plaintiff as if there were a public duty imposed on the company to construct a certain line of railway, and as if the Government were obstructing the plaintiffs in the performance of a public duty, but that was not his view of the matter. The Act was intended not to confer a public duty on the company, but to confer upon it a privilege for its own private benefit. In his opinion that privilege could not be exercised by the company unless they complied with the conditions laid down in the Act of Parliament, and if one of those conditions was that certain consent was necessary, that consent must be obtained before the company could exercise their rights. In his opinion that consent had not been obtained, no agreement with the Commissioner had been made, and the condition precedent to the exercise of the powers given by the Act had not been complied with, and there-

fore the plaintiffs were not entitled to succeed. He confessed that he had some sympathy with the plaintiffs in this matter, for they had been driven from pillar to post, but he could not help saying that by the exercise of a little discretion on their part they might have come to some terms with one or other of the public bodies which had been approached. The Court had heard from Mr Elliott that the Harbour Board was willing to give the company a site which, though not so good as the one the company now claimed, was yet suitable. He was reminded that the Harbour Board would want £10 a month, but if the land within the goods-yard were expropriated it would cost a good deal more. In his opinion there was no right to expropriate this Government land, and therefore he thought that judgment ought to be for the defendant with costs.

Mr. Justice Smith said that the question to be decided was whether the Railway Company had the right to run into the Government goods-yard. As he understood the defence, it was that it was inconvenient for the Government, and would entail great expense upon them, if the plaintiffs were allowed to run into the yard, and that the Commissioner had an absolute discretion to say to the company that they could not come in at all. It was said that the company was incorporated entirely for their own benefit, but he did not agree with that, for the very preamble recited that it was desirable and expedient that a company should be formed to construct and equip a line of railway, and he believed that it was in the contemplation of the Legislature that the line should be for the benefit of the public and the residents of Sea Point. The first section stated that the line should start from a junction with the Western line at or near the Cape Town goods-station, and thence, *via* the Dock-road, to Sea Point. As far as they had gone no reasonable person could have any doubt that it was the intention of the Legislature that the company should start from a junction with the Western line, at or near the goods-yard, the precise spot to be pointed out by the Commissioner. Against that it was said that the Act set forth that the plans must not be inconsistent with any provision of the Act, whilst it was further said that what made it clear that the company had no right to enter the goods-station was the presence of a proviso which said that the company should erect no buildings in the goods-yard except with the consent of the Commissioner. If that had meant that the company should have no power to enter the goods-station at all without the consent of the Commissioner, it would surely have been easy to have said so at once. The proviso was a very reasonable one, but he regarded it only as showing that Parliament considered when it passed the Act that it would be inconvenient that the company should go into the goods-yard and erect their

station where they liked, and that for that reason the Act set forth that the precise spot would be pointed out to the company by the Commissioner. It seemed an absurdity to say that the company should have the right to come into the yard, but not to land passengers there. He did not think it was a question of *mala fides* at all, but he said that under the Act the Commissioner had not the power to refuse the company admission. He thought it would be extremely hard that this company should be tossed about from one place to another. A great deal had been said as to the purchase of the Fish Market, and that the company should have obtained that. Well, probably that would be the best arrangement, in the interests of all, but the view he took of the Act was that the company had got running powers into the yard, and that the Commissioner was bound to point out a suitable spot to them. He did not, however, think that the company had the right to expropriate the Government land. The expense of that would be enormous, and he could not conceive of any benefit. He was convinced that Parliament intended that the company should run over the Government lines, and on that ground he was of opinion that the plaintiffs were entitled to a declaration in their favour.

Mr. Justice Buchanan said that in his opinion the case must be settled purely upon the words of the Act of Parliament. It had been said that the Act was anything but clear or distinct, and that it was difficult to form a conclusion as to what it really meant, but he was inclined to think that the Act must be regarded as a private Act authorising the company to obtain certain privileges, and therefore the onus was on the company to justify all rights which they wished to exercise, by the direct language of the Act. It seemed to him that what had taken place was somewhat of this nature. The promoters of the company framed plans which clearly gave them the right to go within the goods-station. The Government objected to that, and in consequence a clause was put in, on the motion of the Government. The first section of the Act set it forth that the company were entitled to go into the goods-yard, but in consequence of the objection of the General Manager of Railways, the Act went on to say that the plans should apply save and except as they were inconsistent with the provisions of the Act, whilst the proviso laid it down that the company should not erect any buildings in the goods-yard. The second section said that the line should commence at such a junction with the Government line as might be agreed upon between the Commissioner of Crown Lands and the company. It had been said that the company had been driven from pillar to post, but he thought that this consent of the Commissioner was a condition

precedent to the line being commenced at all. If the Commissioner had agreed to such a junction, he could not hold the same views as the rest of the Court that the company would then have had no right of expropriation of land within the yard, providing the commencing point agreed upon had been within the yard. Unless the company could have so expropriated the land, mere running powers would have been nugatory. Consent not having been obtained the only question with him was, could it be withheld. He was not prepared to say then that the consent could not be absolutely withheld at the discretion of the Commissioner, but at least he thought that unless it was shown that the consent had been withheld through *mala fides*, the company had no right to complain. In fact he did not know whether the Court might not go further and say that so long as the Commissioner acted in the exercise of his discretion, and did not agree with the company as to a convenient junction point, he could say that until that point was settled the line should not be commenced at all. All through the Act there was an absence of obligation on the part of the Government to find any convenient spot or anything whatever for this line. It was for the company, if it liked to take an Act in this loose way, to find all that it required, and the only responsibility thrown upon the Government was that they had the authority to say what was a convenient spot at or near the Cape Town goods-station. He considered that judgment should be given for the defendant with costs.

Mr. Justice Smith did not wish to be misunderstood. He did not deny that the consent of the Commissioner was a condition precedent to the exercise of the company's powers under the Act but his opinion was that the Commissioner was bound to point out a reasonable spot in the goods yard where they could put their station.

[Attorneys for the Company, Messrs. Wessels & Standen; Attorneys for the Government, Messrs. Reid & Nephew.]

SUPREME COURT.

THURSDAY, JANUARY 14.

[Before Sir J. H. DE VILLIERS K.C.M.G., (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

THE QUEEN V. SAWYER.

Convict—Visiting Magistrate—Act 23 of 1888, Secs. 9 and 12—Breach of prison discipline — Flagrant breach of prison discipline — Conviction — Sentence — Review.

This was a case in which a convict was charged with breach of discipline, in that he used abusive and threatening language towards an overseer whilst at work. It appeared that the visiting Magistrate found the man guilty, and sentenced him to three months' imprisonment, to take effect upon the expiration of his previous term. Mr. Justice Smith requested the Magistrate to state the clause under which the accused was charged, whereupon one of the officers of the station inserted section 27 of Act 23 of 1888, which did not apply.

The Court now requested to Attorney-General to argue the case as though the convict had been charged under Section 9.

The Attorney-General having argued the case for the Crown,

The Chief Justice, in giving judgment, said it was no doubt important that the discipline of convict-stations should be maintained, but it was equally important that no punishment should be inflicted upon any subject, whether a prisoner or a free man, unless the punishment was authorised by law. The prisoner in this case was simply charged with breach of discipline. The visiting Magistrate did not refer at all to the section of the Act under which he was charged, but the Act made a distinction between breach of discipline and flagrant breach of discipline. A simple breach was punishable under section 12, whilst a flagrant breach was dealt with under section 9. The prisoner was charged with an ordinary breach of discipline. It appeared to him the visiting Magistrate was wrong, and he trusted that in future that officer would not merely charge a person with a certain offence but specify the section contravened. He thought that in such cases as these a summary punishment would be better than adding to a previous term of imprisonment. The only course would be to quash the conviction.

IN THE MATTER OF M. A. CHISM.

Mr. Juta applied to have the rule nisi granted on the 12th inst., calling upon respondent to show cause why a curator should not be appointed to her person and property; made absolute.

The Chief Justice, addressing Mrs. Chism, said he supposed she was aware of the nature of the application. Her brother had applied that someone should be appointed to look after her business and her children. Was there no chance of her giving up her abominable habit of drinking?

Mrs. Chism said she had given it up these last two months.

The Chief Justice said if that were so and the reformation continued she would be put back to her original position. No one wished her to be deprived of her rights, but the rights of her children had also to be considered.

Mrs. Chism said she was willing that her brother should be appointed.

After some further discussion,

The Court appointed Mr. Little curator of the respondent's person and property, upon the understanding that upon her reform she would be put back into sole control.

STUBEN AND OTHERS V. CAPE DISTRICT WATERWORKS COMPANY.

The hearing of this case was resumed, Mr. Schreiner and Mr. Graham appeared for the plaintiffs and Sir T. Upington, Q.C., and Mr. Juta for the defendant company. The case for the defence was opened.

Mr. H. Thwaites, C.E., Resident Engineer to the Table Bay Harbour Board, examined by Sir T. Upington, said he made a gauging of the Albion Spring in 1878, at the instance of the present Vicomtesse De Montmort. It was made in June, 1878, when there was some talk of making ice-works near the spring. The yield was then about 500,000 gallons per day. He examined the spring closely but did not find any considerable leak which would carry away water in addition to the 500,000 gallons. If there had been such a leak he would have seen it. The spring had not at that time been operated upon for the company. He knew that Mr. Ackermann had operated on the spring. His idea was that the spring was supplied by water coming direct from Table Mountain. He had seen the Albion Spring pumped dry, when there were indications that the water came from the bottom, and from the mountain-side. There was no indication that water came from the Westerford Spring side.

By Mr. Schreiner: He only took one gauging in 1878. There was a certain amount of weeds in the spring then. At that time he believed the

spring was two or three feet deep from the surface of the water to the bottom of the spring. He did not remember water bubbling into the river at that spot, that is other water than that included in his gauge. If there had been at that time another 500,000 gallons some feet lower than the bottom of the spring, it would in the ordinary course have ultimately found its way to the valley of the Liesbeek underground, but to say that he had to assume that the other 500,000 gallons were there, which he did not admit. Even had the 500,000 additional gallons been there, it was possible that they would have gone underneath the bed of the river. He had seen the company's works, but had formed no opinion as to where any water which might underlie the superficial yield of the Albion Spring would be likely to go. In 1888 he had occasion to look over the Westerford Spring. It appeared constant, but not strong. He had seen the geological formation of the company's works, and found that the water appeared to come from a strata of hardish clay and broken-up boulders. He did not see any reef. There were three or four eyes of the Albion Spring, the principal one being towards the mountain. His gauging in 1878 was perfectly accurate.

Mr. H. J. Pauling, C.E., late Engineer-in-Chief of the Cape Government Railways, said he was present at a gauging of the Albion Spring in 1879, when the spring was in its original condition. The spring then gave 500,000 gallons per twenty-four hours. In February, 1883, when he gauged the spring, it gave 700,000 gallons per twenty-four hours. In 1886 he gauged it again, and it gave 866,000 gallons per twenty-four hours. Between 1883 and 1886 the spring had been further lowered. He examined the spring again in March, 1890, when the yield was 1,167,000 gallons per twenty-four hours, although the company's works were not complete. He had seen the spring pumped dry and where the water percolated from. The water came from the bottom and from the mountain. None came from the Westerford side, nor did he see any water coming back to the spring from the river. The outlet of the spring was from two to three feet above the level of the river.

By Mr. Schreiner: He had perfect confidence in the figures of Mr. Ackermann, and would, if need be, swear that they were correct, having verified them.

Mr. A. Peirce, managing engineer of the defendant company, said he had supervised the pumping operations since November 4, 1890. Pumping was commenced on December 6, 1890 but before that there had been a trial pumping to see if the pumps were in order. Witness, after stating the method pursued in pumping, placed before the Court returns showing the quantity of water pumped into the company's mains, from

which it appeared that the average was about 800,000 gallons per day. There was always much more returned to the river than was actually used. Fully 500,000 gallons were allowed to go into the river every day.

By Mr. Schreiner: The average time of pumping was nine or ten hours at a stretch. The average quantity taken away per minute by the pumps was 400 to 500 gallons. The total capacity of the pumps was 1,000 gallons per minute, though each pump had gone as far as 1,200 or 1,800 for an hour or so when specially tested.

Re-examined: There were two pumps in case of a breakdown. The lawsuit had not made the slightest difference in the method of working pursued by the company.

Mr. H. W. von Behr, also an engineer in the employ of the company, stated that he had supplied Mr. Peirce with an accurate table showing the hours pumped by the engines.

Mr. C. J. Wood, C.E., said he visited the Albion Spring on December 2, 1891, and made a rough examination, and took a gauging, which gave 850,000 gallons per twenty-four hours as the quantity going into the river when the pumps were going. He proved that by four independent authorities. On December 4 he was there again at five a.m., before the engines had started, and he found then that 1,200,000 gallons were going over the weir per twenty-four hours into the Liesbeek from the works. He again paid a visit on December 7, in company with Messrs. Pauling, Peirce, and Maver, and he found the results of gauging to be about the same—1,200,000 gallons per twenty-four hours. He had gauged the river about Forrest's sluice, and found that the volume of water there was about 4,000,000 gallons per day, but the flow was not continuous for any length of time. He had gauged the Westerford, when the engines were working at the Albion and when they were not working, and found no perceptible difference in the yield. He knew the conformation of the country about the Albion Spring, and did not believe that the Westerford was drained into the Albion. He considered that the Albion Spring was supplied from the gorge near the Devil's Peak. He had tested the Albion water and the Liesbeek water; the former was perfectly pure, but the river water was so foul that it was absolutely dangerous. If the effect of the pumping was to bring water back from the river to the Albion Spring it would show itself at once.

By Mr. Schreiner: He had never seen the Westerford Spring dry. He did not wish to convey to the Court that there were 4,000,000 gallons per day flowing every day near Forrest's mill-race. It was flowing at that rate when he gauged. There was a well-defined stream in the Devil's Peak gorge, and he believed the water found its

way to the Albion Spring. Such a state of things was perfectly possible. There were several springs on Robben Island, and they came from the African continent, the water probably going under the sea bed.

Dr. Marloth deposed that he had analysed the water of the Albion Spring and that of the Liesbeek River in January, 1890, and in November, 1891. From the results of the analyses he was of opinion that no appreciable quantity of Liesbeek water percolated into the Albion. If 200 gallons of river water got into 1,000,000 gallons of the Albion water chemical analysis would show it. The Albion water was perfectly pure, and the river water as foul as could be.

Mr. R. Johnson, nurseryman, said he had known the Liesbeek ten years, and had noticed no change in its flow of recent years.

Mr. John Mogford, nurseryman, gave evidence that he had been on the river six years, during which he had always had an ample water supply, but he had known the river to be quite dry on occasions.

By Mr. Schreiner: During the last two years the volume of water in the river had fallen off greatly.

Mr. T. B. Watson, formerly gardener to Mr. Anderson at Rondebosch, stated that up to December, 1890, he experienced no scarcity of water.

Henry Wentzell and J. B. Hatwell gave corroborative evidence.

Mr. A. Ohlsson, M.L.A., one of the directors of the defendant company, denied that the company received a letter before the works were commenced protesting, on behalf of landowners, against their action. The Newlands stream, with which the company had nothing to do, had diminished in quantity of late years. The lawsuit had made no difference to the methods of the company, precisely the same amount of water being taken as though no such case were in existence.

The Court intimated that they were of opinion that the Company had caused no appreciable diminution of water in the Liesbeek River.

Mr. Schreiner for the plaintiffs contended that there was abundant evidence that the defendant company had from time to time completely diverted the flow from the Albion Spring and consequently were liable for damages.

Counsel in argument referred to *Sanders v. Newman* (1 *Barnewall and Alderson*, 258.)

The further hearing of the case was adjourned *sine die*.

SUPREME COURT.

TUESDAY, JANUARY 19.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice SMITH.]

PETITION OF KATHERINE LA COMBRE.

Mr. Molteno applied, on behalf of petitioner, for leave to sue in *forma pauperis* in an action for damages against David Ernest Hutchins, by reason of breach of contract.

The Court granted a rule nisi, returnable on the 4th February, calling upon respondent to show cause why petitioner should not be allowed to sue him in *forma pauperis*.

PETITION OF MARIA E. J. VAN DER BIET AND ANOTHER.

On the application of Mr. Juta, leave was given to amend certain deeds of transfer relating to three lots of ground marked Nos. 10, 11, and 12, situated about four miles from Cape Town, at the Liesbeek River.

[IN RE IRVINE, A MINOR.

On the motion of Mr. Schreiner, authority was given to the tutor dative to the said minor to institute an action against the Colonial Government for damages caused by fire at the farm Waterford, in the district of Stutterheim, through negligence.

The question of costs to abide the further order of the Court.

SUPREME COURT.

MONDAY, JANUARY 25.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

COCHRANE V. THOMPSON.

Ship — Attachment *ad fundandam jurisdictionem*—Security for costs—Rule nisi.

Mr. Searle moved to make absolute the rule nisi, granted on the 22nd instant, calling upon the respondent, the master of the British barquentine

Lieutenant Maury, to show cause why the said ship should not be attached *ad fundandam jurisdictionem*, the rule to operate as a provisional attachment, but such attachment to be discharged upon the security being given to the satisfaction of the Registrar of the Supreme Court in the sum of £25. It appeared from the petition that petitioner signed articles to proceed from Glasgow to Cape Town in the said vessel, and thence to any port or ports within the limits of 60° N. and 60° S. latitude to a final port of discharge within the United Kingdom. The vessel arrived in Table Bay on the 28th December last, and on the 19th instant the petitioner was, as he alleged, wrongfully discharged and his wages (£15 10s.) withheld. Pending the institution of an action to recover his wages, petitioner now asked that the rule should be made absolute. Copy of the rule was duly served on the first mate of the vessel in the absence of the master; the latter, however, took no notice of the rule, nor had he found the required security. As the vessel had cleared the Customs, and was only waiting for a favourable wind to put to sea, counsel asked that a special order should be made under the circumstances.

The Court made the rule absolute, the rule to operate as an attachment, the ship to have liberty to sail on security being found in the sum of £25. The question of costs to stand over.

STRUBEN AND OTHERS V. THE CAPE DISTRICT WATERWORKS COMPANY.

The Chief Justice referred to the further evidence to be adduced in this case, and remarked that the Court were of opinion that no damage had been proved, and that a purely legal question remained to be argued.

Mr. Justice Smith remarked that it was very desirable that the parties should, if possible, come to an understanding.

Sir T. Upington, Q.C.: We are quite willing, my lord.

WESTERN PROVINCE BANK, IN LIQUIDATION V. DU TOIT, SMITH AND CO.

Partnership — Dissolution — Notice — Overdraft — Non-liability of retiring partners — Bank manager — Release — Doctrine of appropriation of payments, with special reference to *Clayton's case* (Tudor's L. C. in M. & M. Law, p. 1), discussed.

Mr. Juta and Mr. Schreiner appeared for the plaintiffs, and Sir Thomas Upington, Q.C., and Mr. Searle for the defendants Smith & Joubert, the other defendants being in default.

This was an action instituted by the liquidators of the Western Province Bank against Stephanus J. du Toit, Daniel F. du Toit, D. Faen, Ernst J. du Toit, David F. du Toit, D.P. son, Martinus L. Smith Willem A. Joubert, and Dirk I. de Villiers, until lately trading under the style of Du Toit, Smith & Co., for the sum of £5,277 8s 10d., being the amount of an overdraft, together with interest, from the 1st April, 1891. The declaration alleged that the four first-named defendants heretofore carried on business in partnership at the Paarl under the style or firm of D. F. du Toit & Co., and the three last-named defendants heretofore carried on business in partnership at Wellington, under the style or firm of M. L. Smith & Co. The declaration further alleged that in April, 1888, the defendants entered into an agreement of partnership, whereby all the members of the two aforesaid firms of D. F. du Toit & Co. and M. L. Smith & Co. became and thereafter until lately carried on business both at Wellington and at the Paarl as partners under the style or firm of Du Toit, Smith & Co. That during the continuance of the said partnership of Du Toit, Smith & Co., the defendants from time to time became as such partners indebted to the Western Province Bank in respect of moneys borrowed from the said bank by way of overdraft on account of the said partnership, and the amount of the said overdraft on the 1st April, 1891, was £5,277 8s 10d., in which sum the defendants are *in solidum* indebted to the plaintiffs in their capacity as liquidators, together with interest thereon from the 1st April, 1891. The plaintiffs prayed for judgment for this amount, together with interest and costs.

The defendants (Smith and Joubert) pleaded in abatement of the action that the plaintiffs had no qualification by virtue of their capacity as liquidators to have or maintain the action on behalf of the bank, or the shareholders therein, or the creditors thereof. Wherefore the defendants prayed that there might be an abatement of the action and a dismissal of the plaintiffs' claim with costs. The defendants specially pleaded (in case the plea in abatement should be overruled but not otherwise) that in or about the month of October, 1889, the said defendants being about to retire from the said firm of Du Toit, Smith & Co., entered into an agreement with the accredited agent or manager of the said bank, who in that behalf was empowered by, and acted for the persons authorised, to conduct the business of the said bank (herein styled "The Bank"), whereby it was duly agreed between the parties that upon delivery to the said bank by the said defendants of certain scrip or share certificates as by the said agreement provided, that the defendants should, upon such retirement as aforesaid, be released and discharged from all claims present or future of the said bank, upon the said defendants in connection with the

said firm, and from all liability to the said bank upon debts then due or to become due from the said firm to the said bank. That the defendants thereafter duly performed their part of the said agreement, and retired from the said firm to the knowledge of the said bank, and the said defendants gave notice of such retirement to the public, and to the said bank, and the said bank thereupon discharged the defendants from all liability upon any sums owing by the said firm as aforesaid, and wholly released and exonerated the defendants therefrom. That the said agreement is still in full force and effect, and has always been, and now is, binding upon the said bank, and the plaintiffs have by reason thereof no claim upon the defendants. Finally, the defendants admitted the demand and refusal to pay, but they said there was no liability upon them in the premises. Wherefore they prayed that plaintiffs' claim might be dismissed with costs.

The plaintiffs, in their replication, denied that the manager of the said bank did release or discharge the said defendants from any portion of their liability to the said bank, and they said that the said manager had no authority, as the said defendants well knew, to give to the said defendants any release or discharge from their liability. As to any unrealised securities held by the plaintiffs from the said firm or the defendants against the debt due by them the plaintiffs alleged that they were, and always had been, ready and willing to deliver up the said securities upon payment of the said debt. Wherefore they prayed as before for judgment with costs.

Upon these pleadings issue was joined.

Mr. D. van der Spuy, one of the liquidators of the bank, produced the books, showing that the account of Du Toit, Smith & Co. closed on April 4, 1891, with a debit balance of £5,277 8s. 10d.

By Sir T. Upington : He undertook the duties of liquidator in July, 1891. He knew that the defendants deposited a quantity of scrip with the bank in 1889. Those shares had not been sold, but some had been exchanged. There was a committee of directors to supervise overdrafts and report to the Board monthly. The manager could allow overdrafts at his discretion, but if he had any doubt in the matter he could appeal to the Board, which met twice a week. The Board had full confidence in the manager, who could advance largely, but the Board looked more to the character of the borrower than the scrip which was pledged. He was aware, after June, 1890, that Mr. Smith and Mr. Joubert had retired from the defendant firm. He did not remember seeing an advertisement in the *Paarl Advertentieblad* in October, 1889, stating that Messrs. Smith and Joubert had withdrawn from the firm. He took in the paper, but never read

advertisements. He did not know of the withdrawal as a man before he knew of it as a director. He could not swear that he never heard of the dissolution of partnership before June, 1890, but he did not believe he heard before June. The firm retained the name of Du Toit, Smith & Co. after the dissolution.

Re-examined : The only security for the overdraft was the scrip pledged on December 28, 1889, deposited in the name of Du Toit, Smith & Co. From October, 1889, to June, 1890, there was no reference in the minute-book of the bank to any dissolution of partnership in connection with the firm of Du Toit, Smith & Co. When the directors heard, in June, 1890, of the retirement of Smith and Joubert they expressed general surprise. The directors knew of no release to Smith and Joubert, and were no parties to any such arrangement. No authority was ever given to the manager to release any debtor or accept any compromise, and in no other case except this had the manager assumed such a function, but the directors had on occasion exercised those powers. The defendant Smith had been cashier of the Wellington Bank, and Joubert was chairman of the same institution. The defendant De Villiers was managing partner of Du Toit, Smith & Co., both before and after the alleged retirement. In October, 1889, when the withdrawal was alleged to have taken place, Du Toit, Smith & Co. owed the bank £3,886.

Mr. Barend Peter du Plessis, a director of the bank until liquidation, denied knowledge of any such special arrangement as was named in defendants' plea. He did not know of the withdrawal of Smith and Joubert until the manager informed him in June, 1890. As soon as the manager stated that he had released Joubert and Smith witness asked him on whose authority he had done so.

By Sir T. Upington : The bank, at the time of the gold share mania, did a lot of business—he was sorry to say too much. The Board took every step to regulate advances, and warned the manager to be most cautious. He did not take in the *Paarl Advertentieblad*, and never saw the advertisement announcing Smith and Joubert's withdrawal. The directors had told the manager that they held him responsible for releasing the two wealthiest partners without authority. The Board, in August, 1890, resolved to take steps against Du Toit, Smith & Co., unless security for their overdraft were given. The reason why the case had been delayed was that efforts were made to settle it out of court.

The Rev. S. J. du Toit, one of the defendants, said he was a partner of D. F. du Toit & Co., and as such partner he was not aware, from October, 1889, to August, 1890, that Mr. Smith and Mr. Joubert had retired from the firm. He first heard

of it in September, 1890. When he first heard of the alleged withdrawal he denied its legality. Since the date of the alleged withdrawal there had been a Resident Magistrate's Court case, in which witness raised the defence that Smith and Joubert were partners of Du Toit, Smith & Co. They denied that, but judgment was given against them as partners, and it had not been appealed from. When he left for Europe, where he was when the alleged withdrawal took place, he left no power with anyone in the firm of Du Toit, Smith & Co.

By Sir T. Upington: When he left for Europe he left a power of attorney with his brother, but only in his capacity as partner in "The Eendragt" at Pretoria.

By the Court: He returned from Europe in August, 1890, and the month after first heard of the so-called withdrawal. He never gave consent to the withdrawal. The brother with whom he left the power of attorney was not the brother who was a partner in Du Toit, Smith & Co.

Mr. D. F. du Toit, D.F.son, said he was a member of Du Toit, Smith & Co. In October, 1889, the Rev. S. J. du Toit was not in the Colony. Witness had no authority to release any partners or dissolve any partnership, nor did he communicate with the Rev. S. J. du Toit as to the alleged retirement of Smith and Joubert.

By Sir T. Upington: He knew of the retirement of Joubert and Smith from the firm. He agreed to the withdrawal under a misunderstanding.

Re-examined: The Mr. Du Toit who held the Rev. S. J. du Toit's power was in the Transvaal, and had never agreed to the withdrawal. The firm of D. F. du Toit & Co. was not merged into Du Toit, Smith & Co., the latter being a stock-jobbing and speculating business.

For the defence,

Mr. M. L. Smith, examined by Sir T. Upington, deposed that when he decided to retire from Du Toit Smith & Co. he saw the manager of the bank in the presence of Mr. D. I. de Villiers, managing partner of Du Toit, Smith & Co. He told the manager that Joubert and himself had arranged to retire from the business, and said that if the bank would not release them the remaining partners would pledge scrip as further security for the overdraft. The manager said it was all right, and released Joubert and himself, whereupon the withdrawal was advertised. The first time witness heard about any claim against him was in February last. When the release was given the overdraft was only about £4,000, and the scrip which was lodged was valued at £10,000. When witness retired he was bought out by D. I. de Villiers.

By Mr. Juta: He had one interview, which was conclusive, with the manager at the bank. Before seeing the manager he did not communicate with the Rev. S. J. du Toit or his representative, Mr.

Du Toit, in the Transvaal. He considered that when he arranged with the manager of D. F. du Toit & Co., that gentleman's action was binding upon the rest of the firm. An account of the condition of the business of Du Toit, Smith & Co. was made up before witness's retirement, and it was true that when a case against the firm was before the Magistrate, witness denied the existence of the document, but the fact was that he had forgotten all about it. He believed that the statement showed a credit balance of £3,000. D. I. de Villiers paid witness £500 in cash for M. L. Smith & Co.'s share in Du Toit, Smith & Co. When the manager released witness and Joubert, no list of scrip to be pledged as consideration had been drawn up. Witness's chief reason for leaving Du Toit, Smith & Co. was that he lived at Wellington, and could not exercise supervision over the firm's transactions.

By Sir T. Upington: There was no private understanding between witness and the bank manager.

By the Court: It was true that he was anxious to leave the firm.

Mr. W. A. Joubert, the second defendant, stated that he retired because he was annoyed with the management. He was so far from believing that the firm was in a dangerous state that he pressed for a liquidation in place of a retirement. Witness was not present at the interview between Smith and the bank manager, but the latter afterwards told him that he was released.

By Mr. Juta: Witness had been chairman of the Wellington Bank, and considered that if the cashier of the bank had released a debtor for £5,000 the Board would have been bound by his act. He thought a manager had wider powers than a cashier.

Mr. D. I. de Villiers, one of the defendants and a continuing partner of Du Toit, Smith & Co., said that when Smith and Joubert proposed to leave the firm Smith and himself went to the manager of the bank, who duly released them. The scrip was deposited with the bank eight or nine days after the interview, but the pledge form was not actually signed till the end of December, 1889.

By Mr. Juta: In October, 1889, the manager of the bank, who was witness's brother, knew the position of the affairs of Du Toit, Smith & Co. So far as he remembered he did not pay Smith £500 when he retired, but £200, the difference of £300 being owed to him by M. L. Smith & Co., from which he retired when Smith and Joubert withdrew from Du Toit, Smith & Co.

Mr. J. S. de Villiers, manager of the Western Province Bank from 1885 to its liquidation, and at present manager of the bank under the African Banking Corporation, said that at the interview between Smith and himself, the former said that

the other partners had agreed to his retirement provided the bank agreed. Witness consented, on condition that the firm's overdraft was covered by the deposit of all the scrip they held. The scrip was delivered within a fortnight of the interview, and the pledge form signed, but the date and particulars were not filled up till some weeks later. The directors were informed of what had taken place, he believed some time in December, 1889. In October, 1889, when Smith and Joubert retired, the share market was in a flourishing state, and the firm was in an excellent condition of prosperity.

By Mr. Juta : If Smith had requested a written release he would probably have hesitated before signing it. He refused to say if he had made an offer to the directors to settle the case.

By the Court : He could not say why, when Smith and Joubert retired, he did not cause Du Toit, Smith & Co. to open a fresh account.

SUPREME COURT.

TUESDAY, JANUARY 26.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

WESTERN PROVINCE BANK, IN LIQUIDATION,
V. DU TOIT, SMITH AND CO.

Mr. Juta and Mr. Schreiner, Q.C., appeared for the bank, and Sir T. Upington, Q.C., and Mr. Searle for the defendants Smith and Joubert, the other defendants being in default.

Mr. Juta, for the plaintiffs, contended that the manager of the bank had no authority to enter into the agreement relied upon by the defendants, and urged that there had been no dissolution of the partnership, inasmuch as the month's notice provided for had not been given to two at least of the partners.

The Court, without calling upon counsel for the defendants, gave judgment.

The Chief Justice said : It appears to me that under the circumstances in this case the real question is whether there was a *bona fide* retirement of Smith and Joubert from the firm of Du Toit, Smith & Co. Mr. Juta in his very able argument tried to show that there had been no dissolution or retirement and he relied to a certain extent upon the special allegations in the defendant's plea. But to my mind the facts clearly

show that there was a retirement, and that notice thereof was given to the manager of the plaintiff bank. There is certainly some conflict in the evidence as to what really took place in the course of conversation between the defendants and the manager, but there is no doubt upon this point that after the conversation had taken place the defendants decided to retire from the firm and that they gave notice of such retirement in the public papers and that the manager of the plaintiff bank was aware of it.

In my opinion this is sufficient provided the retirement was a *bona fide* one and not a pretended or fictitious one.

As to the position of the manager whatever his powers may have been it cannot be contended that he was not in the position of a person to whom notice could be given. His position as a manager would imply that he had full powers as a manager, and as general manager he would not only have had the powers that each manager of a branch has but generally he would have control over all the different branches and clearly therefore he was the person to whom notice of retirement might be given ; such notice having been given to him the bank is bound by that notice.

The further question that arises on the pleadings is as to whether the manager was authorised to give a release.

One argument against the view that he intended to give a complete release is that the books (of the bank) do not show that there was a complete novation, inasmuch as the old account continues as before in the bank's books. One would have thought that the manager would have acted differently and would have opened a fresh account if he had thought that he had absolutely released the defendants. But then had the books been so altered, inasmuch as the directors must be presumed to have had knowledge of the books, such an alteration would have been almost conclusive evidence of the release, but the accounts were merged in one, and at the time when the defendants retired the balance by the firm of which they were members was £3,885 6s. Payments continued to be made, however, by the new firm, and the only other question remaining now is whether these payments made by the new firm are to be appropriated to the said sum of £3,885 6s.

It is quite clear that more than £3,885 6s. was paid in, and if the presumption is to be made that these payments were in discharge of the oldest debts it is clear that no liability attaches to the defendants. Now I should have thought that no doubt existed as to the rule of law—the general principle is that the debtor is entitled to appropriate the payment to any debt at the time of payment, failing which, the creditor may appropriate it to any debt at the time of payment, in

which respect our law differs somewhat from the English law which allows the creditor to appropriate it subsequently.

Then as to the further right of appropriation there is also same difference, by our law on failure of appropriation by debtor and creditor the payment must be applied to whatever debt it would be most to the interest of the debtor to have paid; but that cannot apply to this case because it is not possible to say to which debt it would be most to the interest of the remaining partners that the payment should be applied—failing such appropriation the appropriation must be made to the oldest debts first.

These principals were fully discussed in *Clayton's case* (Tudor's L. C., p. 1) and the conclusion came to was that the English law agreed with the civil law the principles of which were fully discussed. In that case which was a converse one to the present it was laid down by Sir William Grant, M.R.

(His Lordship here quoted from Sir W. Grant's judgment at p. 15.)

Continuing his lordship said, that case is the converse of this, here the payments were made from time to time and the amounts were paid in from time to time and the bank has no right to say we shall appropriate the payments to debts incurred after the dissolution of the partnership. The bank is bound equally with the customer and is bound to appropriate the payments subsequently made to the oldest debts.

If no notice had been given to the bank they would have been justified in holding the defendants liable but notice was given to their bank manager, such notice binds the plaintiffs and they are not justified in claiming any debts incurred after the retirement by the surviving partners.

Judgment will consequently be for the defendants Smith and Joubert with costs, and judgment will be entered against the other defendants with costs of default.

[Plaintiffs' Attorneys, Messrs van Zyl & Buisson; Defendants' Attorney, J. C. Berrangé.]

THOMPSON V. COCHRANE.

Mr. Molteno moved for the release of the British barquentine Lieutenant Maury from the attachment which was granted yesterday in respect of a claim for £15 10s, for wages due, brought by Cochrane, in his capacity as late steward of the ship. Mr. Molteno read the affidavit of Captain W. F. Thompson, alleging that respondent's wages were not due until he had completed his contract for service, which would not expire until the vessel had completed her voyage to England, and that he was liable to proceedings

for breach of contract and to arrest by reason of his absence without leave.

Mr. Searle, on behalf of the respondent, read the affidavit of the respondent's solicitor, stating that he had not yet been able to procure an answering affidavit in reply to that put in from Captain Thompson, as he had only received a copy of it at four p.m. yesterday.

The Chief Justice remarked, if the statements in the affidavits were correct, there had been a serious abuse of the process of the Court. They could not detain the vessel. He had purposely made the security, £26, as small as possible, believing it would be met, but, after hearing these affidavits the Court could not undertake to prevent this ship sailing on the trivial claim urged. The petitioner might have come into Court and answered the affidavits, he had not done so, and under these circumstances, the rule granted yesterday, would be discharged with costs.

IN RE BOLUS.

On the motion of Mr. Molteno, Mr. Herbert Walter Bolus was admitted to practise as an attorney and notary public.

GENERAL MOTIONS.

MUDIE V. MUDIE.

Mr. Schreiner moved on behalf of applicant for a rule *nisi* calling upon respondent to show cause why his wife should not sue him in *forma pauperis* in an action for judicial separation.

The Court granted a rule *nisi* as prayed.

IN RE THE PETITION OF JURGEN H. J. SMIT AND OTHERS.

Mr. Sheil, on behalf of petitioners, moved to have the award of the arbitrators in the matter of the division, apportionment of rights, and other matters in connection with the undivided farm Uitgeleide Zeekogegat situate in the field-cornetcy of Camdeboo in the division of Graaff-Reinet, in extent 11,968 morgen, made a rule of Court.

The Court granted the prayer in terms of the petition.

PETITION OF WILHELM BATTENHAUSEN AND ANOTHER.

On the motion of Mr. Jones leave was given to sue by edictal citation in an action for recovery of the amount of a mortgage bond due by Cernelius J. J. Swart, whose present residence is unknown. The citation to be returnable on the last day of next term.

PELSER V. VAN DER LINDE.

On the application of Mr. Graham the return day in the above suit was extended to 26th February.

PETITION OF THE CHAIRMAN OF THE
MALMESBURY PUBLIC SCHOOL.

Mr. Schreiner moved for an order directing that the furniture of the said school, now in possession of Adriaan J. T. Roux, be forthwith delivered to the committee, and for an interdict restraining the alienation or disposal of the said furniture, and the dealing with the arrear moneys of the committee.

The Court granted a rule *nisi*, returnable on Tuesday next, calling upon Dr. Roux and the other respondents to show cause why they should not comply with the prayers of the petition, and pay the costs of the proceedings *de bonis propriis*.

REGINA V. KOEN.

Mr. Schreiner for the appellant; Mr. Graham for the Crown.

This was an appeal from a sentence of three months' imprisonment with hard labour passed upon appellant by the Resident Magistrate at Knysna on a charge of stealing two or more yellowwood sleepers.

Mr. Schreiner contended that there was an insufficiency of evidence to convict.

The Chief Justice, in giving judgment, said the difficulty in the case was to find whether the sleepers were really in possession of the prisoner. According to the evidence the sleepers were apart from the main stock, and the evidence against the prisoner was that he admitted having put them aside, and afterwards told Metlerkamp that all the sleepers which were unmarked belonged to him. No doubt it was a case of great suspicion but it was not more than that, and prisoner ought clearly to have the benefit of the doubt. Had the case come before a judge and jury it would have been for the judge to instruct the jury to acquit the accused for want of conclusive evidence. The conviction would be quashed.

[Appellant's Attorney, W. E. Moore.]

STUBEN AND OTHERS V. THE CAPE DISTRICT
WATERWORKS COMPANY.

Mr. Schreiner and Mr. Graham appeared for the plaintiffs, and Sir T. Upington, Q.C., and Mr. Juta for the company.

Sir T. Upington, Q.C., for the defendants contended that inasmuch as no damage had been proved, the plaintiffs were not entitled to an interdict. None of the plaintiffs, except Forrest,

had any right to the water, except as riparian owners, and Forrest had sustained no injury seeing that he had more water than he really was really entitled to.

Counsel proceeded to refer to the pleadings, and remarked that there was no prayer for a declaration of rights, but only for an interdict and damages which he submitted, the Court would not grant.

Mr. Schreiner, for the plaintiffs, referred to the occasions on which the company had diverted the water from the Liesbeek, and to the quantities which the company had pumped in addition to the 500,000 gallons, the daily flow, which on occasions they had entirely diverted. Counsel contended that if no actual damage had been proved still the plaintiffs were entitled to be protected in the future. Counsel referred to "*Bickett v. Morris*" (12, Jur. N.S., 808).

The Chief Justice having intimated that his only difficulty was as to the question of costs, Mr. Schreiner urged that inasmuch as the plaintiffs were likely to obtain a judgment in their favour they were entitled, in accordance with the well-established usage of the Court, to their costs. Counsel referred to "*Walker v. The Cape Central Railways*" (1, C.T.L.R., 85).

Cur ad vult.

Postea (Jan. 27.)

The Court delivered judgment.

The Chief Justice said: According to the evidence the ordinary and natural contribution of the Albion Spring to the Liesbeek River in 1878 amounted to almost 500,000 gallons a day. In 1888 the new owner of the land in which the spring rises made excavations on his land, the effect of which was to increase the contribution from the spring to 700,000 gallons, and in 1886 further excavations increased the supply to 866,000 gallons. The defendant company became owners of the land in 1887, and by their operations the supply has been increased to about 1,200,000 gallons a day. Instead of allowing this increased supply to flow into the Liesbeek River, the defendant company have, since December, 1890, pumped the greater portion of such increased supply into a reservoir situated at a higher level from which they have supplied the inhabitants of the suburbs, who could pay for it, with pure water. Many of the lower riparian proprietors on the banks of the river object to this diversion, and they have joined in the present action with a view to obtaining damages for their deprivation, and to restrain such diversion for the future. The Liesbeek River is a public stream, of which the Albion Spring has from time immemorial been one of the chief sources of supply. The flow into the river has been in a known and defined channel, and

therefore, according to the decision of this Court in "*Vermaak v. Palmer*" (Buch., 1876, p. 25) the defendants are not entitled to the exclusive and unlimited enjoyment of the water, although rising on their own land. "Their rights," as was said in "*Van Heerden v. Weise*" (1 Appeal Court 9), "are limited by the natural rights of the public, so far as those rights are capable of being exercised, and by the common rights of the lower riparian proprietors." By the decision in these cases a very important exception was recognised upon the undoubted doctrine of our law, as stated by Mr. Justice Watermeyer, that "a man may do whatever he pleases with water that rises upon his own property." We are now, in the first place, asked to extend the exception to the case of water which, having pursued its course underground in unknown channels, is intercepted by the owner of land upon which a spring supplying a public river rises. The water so intercepted comes no one knows whence, and if not so intercepted would have gone no one knows whither, but because there is a probability that it would in some way or another have found its way into the river we are asked to declare that the defendants are not entitled to the benefit of it. I have no hesitation in saying that such a declaration would be opposed to every authority to be found in our law. Supposing there had been no spring on the defendant's land supplying a feeder to the Liesbeek River and the defendants by their excavations had obtained a supply of 700 000 gallons a day, not even the plaintiffs' ingenious counsel would have had the courage to contend that, without clear proof that that water had until then flowed into the river in a defined and known course, whether above or below ground, the defendants could be restrained from using the water for their own purposes. The fact that the Albion Spring has been in existence from time immemorial can only affect the known and definite flow of water from that spring. That flow cannot be disturbed to the detriment of the lower proprietors. But the water recently intercepted from unknown underground channels by the defendants and their predecessors in title belonged as much to the owners of the land as the soil excavated therefrom. It has, however, been urged that higher up along the banks of the river is the Westerford Spring, which is one of the feeders of the river, and that the result of the defendants' pumping operations has been to abstract water from that spring. The Albion Spring is about 600 yards distant from the Westerford Spring, but the mere distance would not preclude the possibility of an underground connection. According to Mr. Steuart's charts the pumping at the Albion Spring does seem to affect the flow at the Westerford Spring. It certainly does affect the intervening wells. It

could not, with any show of authority, be maintained that the owners of these wells have any remedy against the defendants. But it is contended that riparian proprietors stand on a different footing. In the course of the argument I referred to an English case "*Grand Junction Canal Company v. Shugar*, 6 Ch. Ap. Ca. 488," which goes far to support this contention. If it does, it appears to me to be in direct conflict with the case in the House of Lords of "*Chasemore v. Richards*, 7 H.L. 349." In the latter case a landowner and wellowner, who had for above sixty years enjoyed the use of a stream which was chiefly supplied by underground water percolating through the strata in no known channels, had lost the use of the stream after an adjoining owner had dug on his own ground an extensive well for the purpose of supplying water to the inhabitants of the district, many of whom had no title as landowners to the use of the water. It was held that the principles which regulate the rights of owners of land in respect to water flowing in known and defined channels do not apply to such underground water, and that the millowner had no right of action. "If," said Alderson B, delivering the unanimous opinion of the judges, "if the rain which has fallen may not be intercepted whilst it is merely percolating through the soil, no man could safely collect the rainwater as it fell into a pond; nor, would he have a right to intercept its fall before it reached the ground, by extensive roofing, from which it might be conveyed to tanks, to the sensible diminution of water which had, before the erection of such impediments, reached the ground and flowed to the plaintiff's mill." And Lord Cranworth, in his judgment, said: "The right to running water has always been described as a natural right, just like the right to the air we breathe; they are the gifts of nature, and no one has a right to appropriate them. There is no difficulty in enforcing that right, because running water is something visible, and no one can interrupt it without knowing whether he does or does not do injury to those who are above or below him. But if the doctrine could be applied to water merely percolating, as it is said, through the soil, and eventually reaching some stream, it would always be a matter that would require the evidence of scientific men to state whether or not there had been an interruption, and whether or not there had been an injury. It is a process of nature not apparent, and therefore such percolating water has not received the protection which water running in a natural channel on the surface has always received. If the argument of the plaintiff were adopted the consequence would be that every well that ever was sunk would have given rise, or might give rise, to an action." But the case is chiefly

important in this Court by reason of the discussion which the civil law authorities received, and the weight attached to those authorities. If the decision had been different I should still have been prepared to hold that by our law the only limitation upon a person's right of ownership in all the water, which, by his labour, he has extracted from his own land, is that it be not done with the malicious intent of injuring his neighbour. "If," says Pomponius in effect, "water coming by underground channels from your land rises on mine, and you cut those channels, by reason of which the water ceases to come to me, an interdict will not lie unless a servitude were owing to me." (Dig. 39, 8, 21). In this respect underground waters were placed upon the same footing as surface rainwater. Marcellus, however, somewhat qualifies this view by suggesting that there might be a liability where water is maliciously intercepted. "If," says he, "a person digging a well on his own land drains that of his neighbour an action will not lie not even *de dolo*. And certainly an action ought not to lie if he dug the well not with the intent of injuring his neighbour but of improving his own land," that is, as I understand the passages, making the land more valuable. (Dig. 39, 8, 1, §12.) The difficulty would be in applying this rule. Under what circumstances can a person be said to have a malicious intent against his neighbour? The only instance in which it has ever been suggested in this Court that a person might be held liable for diverting underground waters is that of an upper proprietor cutting off a subterranean stream, of which he must have known that it flowed down in a defined channel, and rose in the lower proprietor's land. (See "*Vermaak v. Palmer*.") But where, as in the present case, the water abstracted is percolating water not flowing in any defined channel that could possibly have been known to the landowner abstracting it, I am satisfied that he is entitled to the water itself, and not merely to the use of it, even although the abstraction may cause a diminution in the supply of a public stream. This disposes of the plaintiffs' case so far as it affects percolating waters and the diminution of the Westerford Spring. In regard to the second question whether, in consequence of the defendants' works, there has been a sensible diminution in the volume of water flowing down daily in the Liesbeek River below the Albion Stream, the Court has already expressed its opinion in the negative. The plaintiffs' counsel devoted nearly the whole of his argument to an attempt to combat this view, and he said very little about what appears to me to be the real question to be decided. That question is whether, as to the half a million gallons which admittedly flowed down daily before any excavations were begun, there has or has not been an infringement

of the plaintiffs' legal rights. Their right to the use of that water as it flows by their respective lands is subject to a similar right of the defendants. If, therefore, the defendants had abstracted or diverted a portion of the accustomed flow for domestic purposes, or for their cattle, or even for the purpose of irrigating their land, there would, according to "*Hough v. Van der Merwe*" (Buch., 1874, p. 148), have been no infringement of the plaintiffs' rights, provided only no more than a reasonable quantity was so abstracted or diverted. In the consideration of the question whether or not more than a reasonable share had been taken, the absence or otherwise of proof of actual damage would have been an important ingredient. But the defendants have diverted a considerable proportion of the accustomed flow by pumping the water into a reservoir away from their riparian property and distributing it among persons, many of whom are not riparian owners at all. On some occasions they have, for a short time, stopped the flow altogether and, during their daily pumping operations, they have frequently reduced the flow, for several hours a day, below the daily rate of half a million gallons. *Prima facie* these acts constituted an infringement of the plaintiff's rights. The question of reasonable use does not here enter at all, because the diversion of running water for other than riparian purposes has never been recognised in this Court as one of the reasonable uses which the riparian owner may make of a public stream. So strictly is their right of user confined that, even where irrigation is allowed, the water must be returned to the public stream with no other loss than that which irrigation has caused. In the case before the late Appeal Court of "*Hiscock v. De Wet*" (1 Ap. Ct. 58), Dwyer, Acting Chief Justice, expressed "a strong opinion that no riparian proprietor would have the right to divert the water flowing down to the other riparian owners, and take it away to a distant property where it would not ordinarily flow." My brother Smith, as I understand him, concurred in this opinion. That his view is not peculiar to our law is clear from numerous English cases on the point. In "*Ormerod v. Todmorden J.S. Mill Company*" (11 Q.B. Div. 155 at page 172) Bowen, L. J., said: "Whether the original right of a riparian proprietor to the flow of water is in virtue of his ownership of land upon the bank or his presumed title to the bed of the river *usque ad medium flum*, the only legitimate user by him of the water, other than such rights as he may have acquired by prescription, is for purposes connected with his ordinary occupation of the land upon the bank." It may well be that when it is proved that no possible injury can result from such a diversion the Court would not restrain it, but surely the burthen of proving this lies upon

him who diverts the water for unauthorised purposes. If he had diverted the water from a large river like the Orange River he might have no difficulty in shifting the burthen of proof on to the person complaining of the diversion. So a case might arise, as it did in the English case of "Kensit v. Eastern Railway Company (L.R. 27, Ch. Div. 122), where water is temporarily diverted but allowed to return to the river undiminished and unpolluted a few feet from the point of diversion. If it is admitted, as it was there admitted, that there was "neither abstraction, pollution, nor injury, actual or possible," it would be quite consistent with our practice to refuse an interdict restraining such harmless diversion. But where, as with the Liesbeek River, the public stream is limited in quantity, and that limited quantity is further reduced during several hours a day by a diversion to non-riparian proprietors, the strong presumption that injury may at certain seasons result to the lower proprietors must be rebutted by those who make the diversion. That presumption is not rebutted by proof that when the diversion had ceased they voluntarily discharge more water into the river than they had diverted. It is the wrongful diversion, while it lasts, which tends to the plaintiffs' injury and which the defendants must justify. That diversion, if repeated, may become the foundation of an adverse right on the part of the defendants, whilst their voluntary discharge of additional water at certain periods of the day would confer no right by prescription on the plaintiffs. Nor does the fact that no perceptible damage has yet been done rebut the presumption that damage may hereafter ensue. It is part of the defendants' case that the volume of water in the river above Westerford Spring has of late years decreased. If this decrease should still further continue it may become of the utmost importance to the plaintiffs, especially to one of them who is a mill-owner, that there should be a continuous and even flow from the Albion Spring rather than a diminished flow at certain times and a more than proportionately increased flow at other times. In the absence of any rights acquired by prescription, or of proof that no injury can result to the plaintiffs, as lower proprietors, from the diversion, I am of opinion that the defendants ought to be restrained from diverting, for purposes unconnected with their occupation of riparian land, any portion of the accustomed flow of the Albion Spring. It is satisfactory upon this part of the case that our law, after an independent investigation, is found to coincide with that of Scotland as expounded by the House of Lords in "Beckett v. Morris" (12 Jur. N.S. 806). "There is," said Lord Cranworth, "in this case, and in all such cases there ever must be, a conflict of evidence as to the probable result of what is done. The law does not impose on riparian proprietors the

duty of scanning the accuracy or appreciating the weight of such testimony. They are allowed to say: We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it. This is a plain, intelligible rule, easily understood, and easily followed, and from which I think your lordships ought not to allow any departure." By the operations of the defendants and their predecessors in title within the last thirty years a supply of water averaging 700,000 gallons a day has been acquired. This water rises on the defendants' land, and has not formed part of the original or accustomed flow of the Albion Spring into the Liesbeek River. With this supply they may deal as they like. If they can divert this supply without interfering with or impeding the constant and original flow of the water from the spring into the river—and I see no practical difficulty in their way—the Court will not restrain them from doing so. But as to the original flow, they must be interdicted from dealing with it in such a way as to impede the even and continuous flow at the rate of half a million gallons a day, except in so far as the water may be reasonably required for purposes connected with their occupation of the land adjoining the river. There is some difficulty in dealing with the costs. The ordinary rule is that the unsuccessful party pays the costs, but in the present case each party has been unsuccessful upon a very material point. The plaintiffs fail in obtaining the additional supply acquired by the defendants on their own land and there is a special plea to the effect that the defendants are entitled to this water. If they had gone a step further and asked for a declaration of rights to that effect the Court would have granted it, and practically that is one result of this action. On the other hand, the defendants have failed in their attempt to prevent the issue of any interdict whatever. The only course therefore is to order each party to pay his own costs.

Mr. Justice Smith said there was no doubt that an upper riparian proprietor had no right to take out water for uses that would not attach to the owner of a riparian property, but, although he committed that wrong, as a general rule there would be no right to come to a court of law for an interdict, unless damage had resulted from the wrongful act. There was no doubt that many judges had said that the moment the water was abstracted there was a wrong committed, and the lower proprietors' rights were infringed, but on the other hand it was usual for a man who asked for an interdict to show that *prima facie* he had been injured, and for himself he did not see why the same rule should not apply to the cases of riparian proprietors. Many eminent judges had gone further and said that actual injury must be shown. Very much, of course, depended on the

nature of the river. If it were a very large river, like some in England and America, and the water were taken out for purposes of manufacture, that would be no injury, if the water were returned unpolluted. However, he could conceive that there might probably be some injury owing to the non-continuance of the water, and concurred with the judgment of the Chief Justice. His lordship added that it was very much to be regretted that the action was ever commenced. There had been a great public benefit to the people of the suburbs, as the result of the company's operations. For the sake of the public benefit the private owners might have borne the slight damage which they had sustained.

Mr. Justice Buchanan said he was specially familiar with all the decisions of the Court on the questions of water rights and from an examination of those decisions it seemed to him that there was one consistent principle running through the whole of them, with the exception of a decision of Mr. Justice Watermeyer. That judge laid it down that water rising on a man's property was private, but the law seemed to be that water rising on ground was private until it became of a public or common character. In the same way the principle applied to percolating water which, where it rose on private property, was private, and would remain so unless in time it became impressed with a public character. As to public or common water all the cases went to show that it could not be taken for non-riparian purposes, to the injury of the lower proprietors, but in the present case water of a common nature had been taken—he would not say to the injury, but to the possible injury of the other proprietors, and that such an interference was likely to cause damage was sufficient to justify the Court in granting an interdict. The question of taking water from a public stream for the purposes of manufacture had been raised, that was an extraordinary but still a riparian right attaching to riparian proprietors. The two points, he thought, that were settled in this case were that the defendants' contention that they were owners of the water captured by them on their own land was sustained, whilst the plaintiffs' contention that the defendants had no right to interfere with the accustomed flow was also sustained. For those reasons he was of opinion that judgment should be in terms mentioned by the Chief Justice, and that each side should pay its own costs.

[Plaintiffs' Attorneys, Messrs. Reid & Nephew; Defendants' Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

WEDNESDAY, JANUARY 27.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

CATHCART DIVISIONAL COUNCIL V. HART.

Divisional Council—Act 40 of 1889, Sections 141, 197 and 278—Divisional Roads—Public Roads—Accident—Negligence—Damages—Appeal.

Mr. Schreiner, J.C., appeared for the appellants; and Sir T. Upington, Q.C., and Mr. Molteno for the respondent.

This case, which raised a question of considerable importance to Divisional Councils, farmers, and others, was an appeal from a judgment of the Acting Resident Magistrate of Cathcart.

The respondent (plaintiff in the Court below) sued the Cathcart Divisional Council for £10—£5 for damages alleged to have been sustained by the plaintiff on the 18th August last by reason of the bad state of repair and defective drainage of the public road across the farm Springfield in the division of Cathcart, owing to which one of plaintiff's wagons fell into a mud-hole in consequence of which the disselboom was broken, and for the detention and delay of plaintiff's three waggons occasioned by the accident; and £5 for damages alleged to have been sustained by plaintiff on the 19th August last, owing to the defective state of the public road crossing the farm Hartfield, on account of which another disselboom was broken.

At the hearing of the case Mr. Yates, on behalf of the Council, took exception to the summons on the grounds that it disclosed no cause of action, there being no allegation in the summons that the places where the alleged damage took place were on a main road or divisional road.

The exception was overruled, and judgment given for plaintiff for £5 with costs.

The Magistrate stated in his reasons, *inter alia*, that the Court was of opinion that the defendants recognised their liability by appointing a commission, consisting of three of their own members, some two months after the accidents had occurred to proceed to the places in question to examine and report to the Divisional Council at its next meeting, but summons was issued before the next ordinary meeting would have been held. Further, that the Court was satisfied that although the road in question was not a proclaimed road yet the Divisional Council recognised the same as a public road, and that public moneys had from time to

time been spent on it, and that from the evidence of the Road Inspector it was clearly shown that on the 12th August he reported to the Divisional Council that he had inspected the Thorn River road (the road in question) on the 28th and 29th July and had found the same bad and boggy, and that no steps were taken from that date to the date of issue of summons to repair the road.

The appellants (defendants in the lower court) now appealed from the Magistrate's judgment.

Mr. Schreiner, Q.C., read the record from which it appeared that the first accident was due to the non-repair of certain catch-water drains from which the water flowed on to the road and so cut it up that it became dangerous for traffic and that the second accident took place in consequence of the wagon having stuck in a large mud-hole in the road.

Mr. Schreiner, Q.C.—Act 40 of 1889, Sec. 141, confers the power and imposes the duty on Divisional Councils of making all divisional roads, and of superintending, maintaining, keeping in order, preserving and improving all main and divisional roads; but there is no reference made in the section to public roads, and if it were not for the provisions of the 278 section, the Court could interdict a Divisional Council from spending money on such roads.

Mr. Justice Smith: Who then is to repair these public roads?

Mr. Schreiner: The Act provides (section 278) that a Divisional Council may at its discretion expend surplus money in that way, or under Section 197 it may levy a special rate at the written request of a majority of three-fourths of the ratepayers in one or more field-cornetries. With regard then to the first accident the Divisional Council cannot be held liable because the damage is too remote. It cannot be said that because a Divisional Council has worked upon a public road, not being a main or divisional road, that it sufficient to fix it with liability for accidents that may happen on such road.

Nor is it liable for the second accident as no duty was imposed on the Council to make or repair the road upon which the accident happened.

Counsel referred to the *Liesbeek Municipality v. Partridge* (4 Juta, 806), and *Rivenhall v. The Divisional Council of Tarka* (5, E.D.C., 855).

Sir T. Upington, in the course of his argument, said he placed considerable reliance on section 278, Act 40, of 1889. This, he said, completely altered the procedure of divisional councils, which had previously been regulated by section 48, Act 9, of 1868. Under the old law it was permissive with divisional councils to expend funds at their disposal upon the maintenance and repair of public roads, but the new Act rendered such action compulsory upon these bodies. If it could be shown against a divisional council that it had at its dis-

posal surplus funds it could be compelled to expend them on the construction and repair of public roads for the benefit of the division.

The Chief Justice, in delivering judgment, said that section 278 of Act 40 of 1889 drew a clear distinction between divisional roads and public roads. The Act laid it down that certain moneys should be expended firstly in the construction, maintenance, preservation, repair, and improvement of divisional roads, and secondly to the making or improving of any public roads within the division, not being main or divisional roads. There was no obligation, therefore, upon the Council either to maintain or to preserve or repair public roads such as was the case regarding divisional and main roads. He must assume that the Legislature did not intend to impose upon Divisional Councils the same obligations with regard to public roads as to divisional roads. In the present case there was evidence, in regard to the first accident, that the Divisional Council had made certain catch-water drains, and the effect of those had been to throw a volume of water on to the public road which would not have been there if the catch-water drains had not been constructed, and the effect of that volume being thrown on the road was to make a ditch or sluit across the road, and the further consequence was that when the plaintiff's wagon came to that sluit the dieselboom of the wagon was broken. Clearly the plaintiff had an action against the defendants for that. It was the act of the Divisional Council which caused the sluit to cross the road. But for that act the injury would not have happened, and he thought the Magistrate was right in giving judgment for the plaintiffs in regard to that injury. The second accident was caused by a hole in the public road. If there had been evidence that that hole was caused by any act of the Divisional Council he would have been prepared to hold also that defendants were liable for the damage which was done to the wagon. In his opinion there was no evidence whatever to show that the hole was in any way caused by the act of the defendants. If there had been no Divisional Council in existence, and if the road had not been constructed in any way by the Divisional Council the hole would still have been there, and the wagon injured. But that would not be a sufficient answer by the Divisional Council if the duty were imposed upon it not only of making public roads but also of repairing them, but inasmuch as that was not the case the defendants could not be held liable for the second accident. The Magistrate gave £6 damages, and apparently intended that that should be £3 in each case. The Court would therefore alter the judgment of the Magistrate by giving judgment for the plaintiff for £3 with costs in the Magistrate's Court, but he thought that the appellants were

entitled to their costs in this Court. It was an important point that the 141st section of the Act 40 of 1889 did not mention public roads at all, and that where they were mentioned, in section 278, it was only after divisional roads had been disposed of.

Mr. Justice Smith concurred with the Chief Justice as to the first accident, but with regard to the second he considered that the hole was caused firstly by the road not having been properly constructed originally, and secondly by the repairs not being properly carried out, and was therefore inclined to hold the Divisional Council liable for that also.

Mr. Justice Buchanan said he thought it was clear that the Act of 1889 did not impose upon divisional councils the absolute duty of making and repairing public roads, but left them the privilege of expending money in that way under certain circumstances. He could not hold the Council liable for the second accident.

[Appellants' Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. van Zyl & Buissinne.]

NEL AND TIRAN V. LIND AND TIRAN.

Mr. Schreiner and Mr. Molteno appeared for the original plaintiffs; Mr. Tredgold, as *curator ad litem*, for the minors interested; and Mr. Searle and Mr. Webber for the defendant Lind.

The facts in this case have been already reported (1 C.T.L.R. 257). The matter was last before the Court on the 11th September. On that occasion Mr. Tredgold was appointed *curator ad litem* to represent the minors.

The case now came on for further argument.

Mr. Tredgold contended that the executors had definite instructions and were bound by the words of the will. A good price was obtained, and the sale to Tiran should have been duly carried through. The second sale to Edmeades was unauthorized being a private one. The executors are liable for any damage that might result (see *Letterstedt's case*). Further the executors were guilty of great negligence. Sureties should have been required of Edmeades. The terms of credit, 2, 4, and 6 years, subsequently extended to 4, 6, and 8 years, were unusually long. Taking G. M. Edmeades as surety was not sufficient. Transfer should not have been passed without part payment of the purchase price. The first instalment should have been paid. The executors were wrong in regarding Vincent's telegrams at all. They had a power to pass a bond with his general clause. They should have insisted on this or else cancelled his sale. (*Marsh v. Barry & another*, 5 J. 217). In Edmeades's estate £395 was available to pay concurrent liabilities. This was lost through leaving out the general clause. Thus damages may be laid at £1,666 18s. 4d., the first

instalment, and £985, the amount lost through leaving out the general clause: Or again if Tiran's sale had gone through the loss is £4,500, less £1,900, the highest price at present obtainable.

Mr. Schreiner and Mr. Searle were also heard.

The Chief Justice suggested that the parties should make another effort to come to an arrangement.

The case was ordered to stand over for the present.

SUPREME COURT.

THURSDAY, JANUARY 28.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

OHLSSOHN'S CAPE BREWERIES COMPANY V. WHITEHEAD.

Sir T. Upington, Q.C., and Mr. Juta appeared for the company, and Mr. Schreiner, Q.C., and Mr. Sheil for the defendant.

The arguments in this case, which was last before the Court on December 16 (1 C.T.L.R. 344), came on for hearing.

Sir T. Upington: The case of "*Porter v. Phillip*" (Buck., 1876, p. 192) will have a considerable bearing on the present case. The defendant has no right to demand of plaintiffs that they should maintain a road merely because that road happened to be marked on the general plan at the time the lots were sold. There is no servitude of way on our title deeds, nor is there anything which imposes such a servitude on us. The remaining extent is vested in the plaintiff company. The disputed road could be of no convenience to the defendant. For over thirty years no right of way has been asserted. Counsel referred to "*Berridge v. Ward*" (10 C.B., N.S., 400), and "*The Municipality of Beaufort West v. Wernich*" (2 Juta, 86).

Mr. Schreiner: What is the position of plaintiff? He first sets up title and then abandons that plea. He has not proved ownership; the most he has had has been possession.

The Chief Justice: Is the question not narrowed down to this, whether when there has been a sale of lots by public auction, and several roads are marked on the general plan, the purchaser of each lot is entitled to use every road marked on the plan or only such roads as were reasonably necessary as a means of access to a public road,

Mr. Schreiner : The question of right is independent of convenience. The evidence is clear that Whitehead has always asserted his right to go over the disputed road, and whenever any attempt has been made to block it he has always removed the obstruction. Plaintiff's claim of prescription cannot be sustained. Counsel in his argument referred to *Porter v. Phillip* above cited, and *Hiddingh v. Topps* (4 Searle, 107).

At the conclusion of the argument,

The Chief Justice gave judgment. His Lordship said that the main question to be determined in the case was whether the plaintiff company had established their right to the ownership of the land which formed part of the road now claimed on behalf of the defendant. He was satisfied on the evidence that for more than thirty years the plaintiff company and their predecessors in title had been in constant possession of the land, and that their occupation had been sufficient to entitle them to the ownership, subject, of course, to any right of way the defendant might prove that he possessed. Their occupation had been an open and peaceable one, and it had certainly not been a precarious one, for they had asked no one's permission, and had occupied it adversely against whoever might claim to be the owners. It was a somewhat difficult question, upon the facts, to decide who, after the sale in 1861, retained the dominium of the remaining extent. There was no clear evidence, as there was in the case of "*Porter v. Phillip*," to enable the Court to decide whether there was any intention to vest the ownership of the roads in the persons who bought the different lots, or whether the intention was to retain the ownership for the owner of the remaining extent; but for the purposes of that case he would assume that the intention was to reserve the ownership in the land now in dispute in the owner of the remaining extent. Even then, there was, in his opinion, such an adverse possession as against such an owner of the remaining extent as to vest the ownership of the soil itself in the plaintiffs, who were entitled to come into Court and complain of any interference with their ownership, but of course if the defendant could establish his right of way through the property he thought the defendant must succeed, because the ownership of the plaintiffs would then be subject to the right of way. The defendant did undoubtedly claim such a right of way before the time of prescription had arrived. The next question was to determine whether the defendant possessed such a right of way. Now, that raised the very important question whether, where there was a public sale by auction, of land, and at the auction a general plan was shown, and there were different roads adjoining the different lots, and the general plan was registered, every purchaser of a lot had in such a case a right of way over every road

appearing on the plan. He did not know of a case in which that Court had gone so far. The case that had gone farthest had been the case of "*Hiddingh v. Topps*," but even there it was admitted that there might be roads upon such a general plan which purchasers were not entitled to use, and he had arrived at the conclusion that the purchasers and their successors could only claim the use of such roads as were reasonably necessary as a convenient means of access to the public roads of the district where the land was held. In the present case, looking at the plans produced and the evidence given, he was satisfied that it was not necessary for the convenience of the defendant that he should have the road which he claimed. The road really led nowhere. In order to enable the defendant to reach Dean-street, he admittedly had to trespass over other peoples' property. The defendant could use the Palmboom-road on the one hand, and the divisional road on the other, but he insisted on crossing this inconvenient piece of road, in order to enable him to reach, as he said, Dean-street. The other road, on the northern side, had never been used, admittedly, and the only one of these roads which was really claimed by the defendant was the one leading through a stream of water on the northern boundary. There was a high bank at that point, and the place was really a kind of *cul de sac*. The defendant managed to reach a road by turning into the Anneberg property, and then turning again into the road. Now, a useful test as to whether this road was reasonably necessary was afforded by the actual use of it. The sale took place in 1861, and since then no attempt had been made to construct a proper road. The high bank remained; there was jungle from one end of the place to the other, and though the defendant might have used the road as a footpath no attempt had been made to make a proper road, and he was satisfied that if the road had been reasonably necessary, some road would have been made before now. It had not been proved that either in 1861 or any time afterwards, or even at the present time, the road had been reasonably required, and therefore the defendant ought to fail. He did not think the Court was called on to make any order as to damages, but was of opinion that the plaintiffs had made out the claim set forth in prayers (b and c) of their declaration, that the defendant was not entitled to go on the land, and secondly that the plaintiffs were entitled to a perpetual interdict restraining the defendant from trespassing on the land. Costs to follow the judgment.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorney, J. Hamilton-Walker.]

SUPREME COURT.

MONDAY, FEBRUARY 1.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

LEWIS AND CO. V. C. W. SCHMIDT.

Mr. Tredgold moved for provisional sentence on a cheque for £11 10s., less £5 paid on account. Provisional sentence was granted.

SAVAGE AND HILL V. BYDELL AND UYS.

Mr. Juta applied that the provisional order of sequestration might be discharged. The order was granted.

STANDARD BANK V. A. H. MCLEOD.

Mr. Molteno moved for provisional sentence on a promissory note for £248 19s. 8d., less £37 6s. 6d. paid on account.

Mr. Searle appeared for the defendant, and read his affidavit the paragraphs most material to the defence being as follows:

2. That in or about the month of April, 1890, one Anthony van Buuren and deponent entered into a joint purchase of one hundred Wolhuter gold-mining shares at 80s. per share.

3. That deponent paid for the said shares, and subsequently drew upon Van Buuren at Cape Town for the value of the one hundred shares, instructing him to sell deponent's fifty shares (of the parcel of one hundred) at a price to cover purchase price, or else to re-draw upon deponent in the usual way if a price to cover could not be obtained.

4. That Van Buuren could not sell to cover, and advised deponent that he was re-drawing upon him.

5. That Van Buuren's draft duly reached deponent at Johannesburg, and was presented to deponent, but without any scrip attached. That deponent, in the absence of the scrip (fifty Wolhuter shares), refused to pay the amount of the draft.

6. That deponent made three or four applications, at intervals extending over a period of two weeks or more, for his shares so as to sell the same and pay the draft, but his applications were fruitless, the bank being unable to deliver the said shares, which had then declined to about 60s. per share.

7. That about three months or thereabouts subsequent to deponent's application for his shares the Standard Bank presented a draft to deponent and tendered delivery of the fifty Wolhuter shares, which by this time were of the value of about 40s. each.

8. Deponent refused at this stage to either pay the draft or accept the shares, as considerable loss had resulted through delay, not of deponent's making, in delivery of scrip.

Counsel stated that the matter arose out of this share transaction, and that the amount sued for was really owing by Van Buuren, who had failed to sell the shares defendant ordered to be sold. The note now sued upon had been signed by defendant solely on the understanding that the bank would not press for payment so long as interest was paid. Counsel added, after reading the affidavit, that as interest had not been paid, and judgment had already been given against the defendant in the Transvaal, he did not see how he could oppose judgment being granted on the Pretoria judgment.

Provisional sentence was granted on the Transvaal judgment.

BARTLETT V. BARRETT.

Mr. Jones moved for provisional sentence on a bond for £210, with interest at 8 per cent., less £48 10s. 6d. paid on account.

Provisional sentence was granted, and the property declared executable.

KAFFRARIAN COLONIAL BANK V. H. C. SCHUNKE.

Mr. Tredgold moved for provisional sentence for £5,000, with interest from April 11, 1891. Counsel stated that the matter had arisen out of a sale of land by Major Elliott in connection with the Pondoland railway project.

Provisional sentence was granted.

CAPE OF GOOD HOPE BANK V. KINGSLEY.

Mr. Sheil moved for compulsory sequestration of the defendant's estate, the provisional order having been granted on January 15.

The order was granted.

DOWNING V. J. S. FERREIRA AND OTHERS.

Mr. Tredgold moved for final order of sequestration of the defendants' estates.

The order was granted.

WATSON'S EXECUTORS V. WATSON AND OTHERS.

Mr. Juta moved for judgment, by default, against each defendant for £707 9s., with interest. The order was granted.

BUDD V. BLANCKENBERG.

Mr. Jones moved for judgment for £25 under rule 329.

The order was granted.

REHABILITATIONS.

On motions from the bar, the Court granted the rehabilitations of Petrus Jacobus Joons and Walter Hasell.

BOTHWELL V. BOTHWELL.

Mr. Jones for plaintiff; defendant in default.

This was an action for divorce by the husband, by reason of the adultery of his wife. The parties were married at Worcester in March, 1887, and it was alleged, according to evidence taken on commission, that the respondent committed adultery at Zwartkops about April, 1890, and on several other occasions. Counsel proceeded to read the evidence, to the effect that respondent had frequently been committed for drunkenness, and was well known at Port Elizabeth as a common prostitute.

A decree of divorce was granted.

WILLEMSE V. WILLEMSE.

Mr. Maskew for plaintiff; defendant in default.

This was an action for divorce by the husband Moss Willemse, by reason of the adultery of his wife, Mary Ann Willemse. The parties were married in 1869, at the Paarl, and in April last, according to the evidence of the petitioner, his wife left him, and had since been living with Rajap Smith, a Malay man, at the Paarl. Respondent had confessed to a witness that she had changed her faith and become a Malay, and was married to Rajap.

A decree of divorce was granted.

WOODCOCK V. WOODCOCK.

Mr. Searle for the plaintiff; defendant in default.

This was an action for restitution of conjugal rights, failing which for divorce and custody of the surviving child of the marriage. The parties were married at King William's Town in February, 1884. Petitioner gave evidence that at Cape Town in April, 1890, her husband deserted her, and had since refused to return to or support her, and still refused, although he had been requested to do so. Petitioner, whose maiden name was Christina Cole, stated that her husband was the manager of a music warehouse for some time

after the marriage, and afterwards musical director of the Searle Opera Company. For some time her husband sent her £4 a week, but had sent nothing for fourteen months past. In December, 1890, her eldest child died, and then her husband sent £11, which he said he had to borrow. Her parents were at present supporting her, but she was informed that her husband was earning a good salary as a musician, and perfectly able to support her.

The Court granted an order for restitution of conjugal rights, respondent to return to or receive his wife on or before the last day of term, failing which to show cause, on March 12, why a decree of divorce should not be granted; petitioner to have the custody of the child in the meantime.

MOSS V. MOSS.

Mr. Sheil appeared for the plaintiff; the defendant in default.

This was an action for divorce instituted by the wife, Ida Moss, by reason of her husband's adultery. The parties were married in 1887, and lived at Simon's Town for a year and a half. At the end of that time respondent went to Johannesburg, where petitioner joined him in September, 1888, and remained till November of the same year. Petitioner stated that her husband was addicted to drink, and had not always supported her, he having been dismissed from several situations on account of his dissolute habits. Witness was at present matron of the hospital at Simon's Town.

Ellen Coenraad, a coloured woman, deposed that defendant committed adultery with her during 1890 at Simon's Town.

Georgina Newman, another coloured woman, gave evidence that she remembered defendant and the witness Coenraad coming to her mother's house, where they occupied the same room. This was in July last year.

A decree of divorce was granted with costs, the petitioner to have the custody of the children of the marriage.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinne.]

GENERAL MOTIONS.**VAN DER MERWE V. VAN DER MERWE.**

Mr. Tredgold mentioned this matter, which was an application to have Martha Maria G. van der Merwe declared of unsound mind. The evidence, which was taken on commission, was to the effect that the respondent had been an imbecile from her birth, and required looking after, being incapable of managing her own affairs. It was suggested

that Mr. J. H. Zoer, secretary of the Piquetberg Divisional Council, should be appointed curator of the property, £97 being due to the imbecile, and the mother appointed curator of the person.

The Court declared the respondent of unsound mind, and appointed her mother curator of her person, and Mr. Zoer curator of her property on his finding security in the ordinary course.

PETITION OF JOHAN FREDERICK WICHT.

Mr. Maskew moved to make absolute the rule nisi authorising the Registrar of Deeds to cancel certain mortgage bond passed on February 9, 1888, by Jaasiem Abdol Ragiem for £200, in favour of Johan S. Leibbrandt, and subsequently ceded to petitioner.

The order was granted.

IN THE MATTER OF THE MINORS STEYN.

Mr. Searle moved for leave to the executrix testamentary of the estate of the late Hendrick T. Steyn to raise a loan on mortgage of certain farm known as Rietvlei, in the district of Middelburg, for the purpose of satisfying a bond of "kinderbewys," and the costs of the transfer of the said farm to the minor heirs of the estate.

The order was granted.

HOPKINS V. HOPKINS.

Mr. Graham moved for an extension of the return day of the rule nisi and notice of trial in the suit instituted by plaintiff against her husband for restitution of conjugal rights.

The order was granted.

BURN V. BURN.

Mr. Sheil moved to make absolute the rule nisi for a decree of divorce, custody of the child of the marriage, and a monthly allowance for maintenance, by reason of defendant's failure to return to or receive his wife, in terms of the judgment of the Oudshoorn Circuit Court.

The rule was made absolute with costs.

KLINCK V. KLINCK.

Mr. Searle moved to make absolute the rule nisi for a decree of divorce and custody of the child of the marriage, by reason of defendant's failure to return to or receive his wife, in terms of the judgment of this Court.

The rule was made absolute.

IN RE SCHMIDT AND OTHERS V. WHEELER.

Evidence—Case pending—Refusal of Magistrate to take evidence until date fixed for trial—Application for a *mandamus* refused.

Mr. Graham moved for a *mandamus* calling upon the Resident Magistrate of Wynberg to take the evidence of one Joseph Armstrong without delay. Counsel stated that an action between the parties was pending in the Wynberg Court, and that the evidence of Armstrong was imperatively necessary to the plaintiff. The case had been postponed till February 11, and Armstrong would leave for Daassen Island on the 8rd. The Magistrate had fixed the case for the 11th, but was perfectly willing to take the evidence of Armstrong, but considered that he was unable to reopen the case before the 11th, unless respondent consented.

Mr. Juta appeared for the respondent.

The Chief Justice: Are the facts correctly recited, Mr. Juta?

Mr. Juta believed they were, whereupon

The Chief Justice said it seemed monstrous that this evidence could not be taken, simply because the Magistrate happened to have set down the hearing for the 11th.

Mr. Juta submitted that the Magistrate was the proper person to deal with the matter, and fix the date of hearing.

The Court declined to grant the *mandamus*, but expressed the opinion that the Magistrate was perfectly at liberty to hear the case before Mr. Armstrong's departure, if he thought fit.

The Chief Justice remarked that if it had been thoroughly made clear to the Court that the Magistrate had refused to anticipate the date of hearing because he was not satisfied as to his legal position, the Court would have granted a *mandamus*. The opposition had been unreasonable.

SUPREME COURT.

TUESDAY, FEBRUARY 2.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH and Mr. Justice BUCHANAN.]

REGINA V. HOFFY.

Railway—Act 19 of 1861—Bye-laws—Contravention—Conviction by Special J.P.—Non-jurisdiction — Review — Conviction quashed.

Mr. Justice Smith remarked that this case had come before him in which the prisoner had been

sentenced by a special justice of the peace for contravening Act 19 of 1861, in that he was found travelling in a railway carriage without a ticket. He (Mr. Justice Smith) was not aware that the special justice of the peace had jurisdiction, but he would like the papers to be handed to the assistant law adviser to the Crown for investigation.

Subsequently Mr. Giddy appeared in court, and observed that he could not argue in support of the conviction, as the special justice of the peace had no jurisdiction.

The conviction was accordingly quashed.

REGINA V. CAMFER AND SAYSE.

Master and Servant—Act 18 of 1873, Sec. 2
—Alleged contravention—Conviction—
Special J.P.—Review—Conviction quashed.

Mr. Justice Buchanan said that this case had come before him, in which two servants were charged before a special justice of the peace with contravening section 2 of Act 18 of 1873, in that without leave or lawful excuse, they had absented themselves from the premises of their master. The evidence was that the men were engaged by the day and paid by the day, returning to the farm each morning. The offence was certainly not a contravention of this section, whilst the fine of 30s. which was inflicted was illegal, £1 being the utmost fine for a first offence of this kind. The conviction would be quashed.

WATSON'S EXECUTORS V. WATSON'S HEIRS.

Mr. Juta mentioned this case, and said that on Monday he moved for judgment against the defendants. He now applied that the moneys attached by the Sheriff to found jurisdiction might be declared executable.

The order was granted.

In re UNION BANK V. BEIT.

The Chief Justice said there was a case brought by the liquidators of the Union Bank against Mr. Beit which had been set down for Thursday, but was afterwards put off till Monday without the Court being consulted in the matter, and now he was informed that the case was adjourned *sine die*, owing to the illness of Mr. Gibson. He should have thought that after two years' preparation the plaintiffs would have been ready for trial.

Sir T. Upington said that he was senior counsel for the defendant, and he did think it was hard on Mr. Beit that the case should be again adjourned. No doubt Mr. Gibson was ill, but surely Mr. Steytler could do what was necessary.

The Chief Justice: Why is Mr. Gibson so necessary?

Mr. Juta said that no one would be more glad to have the case tried than his clients, but the fact was that Mr. Gibson had this matter in charge, and was ill in bed and not to be seen.

The Chief Justice said he thought the Court ought to be in some way consulted before cases were moved about in this manner.

VAN RENEN V. VAN RENEN.

Sir T. Upington, Q.C., and Mr. Juta for the plaintiff; defendant in default.

This was a suit for divorce brought by the wife on the grounds of her husband's adultery.

The plaintiff, Christina Maria van Renen, stated that she was married in July, 1875, and that there were six children of the marriage, the youngest being seventeen months and the eldest fourteen years old. For the first three years she and her husband lived happily, but afterwards her husband grew dissatisfied with his home, and took to gambling. Nearly ten years ago witness first suspected her husband's fidelity, but made no effort to prove the truth of her suspicions. In June, 1890, defendant went to Kimberley, and since July of that year had not cohabited with witness. Defendant had been very violent to her and on several occasions had ill-used her by striking her with a screwdriver. He was a forage dealer, and also speculated in cattle. Defendant had alleged she had been unduly intimate with a Mr. Street, but had since abandoned that position. There was not the faintest truth in that allegation.

Christina Alexander, cook in the service of the petitioner, gave evidence that on one occasion she saw the defendant and a woman in his bedroom during the absence of plaintiff in the country.

Johanna Blouw, a domestic servant living near to defendant, and Rose Jordaan, a married woman, corroborated the evidence of the last witness.

A decree of divorce was granted with costs, petitioner to have the custody of the children, and defendant to pay her £10 per month until the youngest child was twenty-one years old; the first payment to be made forthwith, and subsequent payments on the first day of each month.

[Plaintiff's Attorney, W. E. Moore.]

DE VILLIERS V. COLE.

Loan—Hire—Wrongful detention—Damages
—Costs—Appeal.

Mr. Searle for appellant; Mr. Graham for respondent.

This was an appeal from a judgment of the Resident Magistrate of Wynberg in an action

for the recovery of £5 4s. 9d., in which the appellant De Villiers was defendant, and the respondent Cole plaintiff. There were two accounts, one for £3 8s. 9d. and the other for £1 16s. The first was for bread supplied, and the second for the hire and use of a saddle. On the first account the Magistrate found in favour of the present appellant, but on the second he gave judgment for the plaintiff and put the defendant to all the costs of the suit. The respondent's contention was that the saddle was lent in a friendly way, and that although it was kept eighteen months, no legal notice requesting its return, or intimating that its use would be charged for, had been given.

Mr. Searle, for the appellant, contended that there was no principle of law by which appellant could be held liable for the hire of the saddle, as the contract had been one of loan. No notice had been given by respondent that hire would be charged for the detention of the saddle, and consequently it continued on loan. The action should have been brought for damages for ill-using the saddle. With regard to the question of costs, the Magistrate was clearly wrong. The respondent had failed on his first claim, and yet the Magistrate allowed the costs of witnesses who were called in support of that claim.

The Chief Justice gave judgment. It was not necessary, he said, to call on Mr. Graham, because the Court was satisfied that substantial justice had been done. It would have been more regular if the summons had asked for damages for wrongful detention of the saddle, but after all that was a pure matter of form, because the measure of damages for wrongful detention would have been a reasonable price for the use and possession of the saddle during the period complained of. That was virtually what the summons asked for. It was argued on behalf of the appellant that originally the matter was a mere loan, and that unless notice had been given by the respondent that charge would be made for the use of the saddle no such charge could be made. He would like to have seen some authority for such a proposition; in the absence of that authority he could not agree with the proposition. The judgment of the Magistrate ought not to be interfered with, and the appeal would be dismissed with costs.

[Appellant's Attorney, J. Hamilton-Walker; Respondent's Attorney, Messrs. van Zyl & Businnee.]

KOTZE V. LAUBSEER.

Mr. Joubert for the appellant; Mr. Searle for the respondent.

This was an appeal from the Resident Magistrate of Calvinia, in a case in which the plaintiff claimed to recover a certain mare and foal, which

he declared defendant illegally possessed. Plaintiff (Laubser) and a number of other witnesses gave evidence before the Magistrate to the effect that the horse and foal belonged to him, and had on his mark, which was well known. For the defence evidence was given by defendant and several witnesses, to the effect that the mare and foal were his property. The appeal was made on the ground that the decision was against the weight of evidence, and that the identification of the animal had not been established.

Mr. Joubert was heard in support of the appeal.

Without calling upon Mr. Searle,

The Chief Justice gave judgment. The evidence, he said, was very evenly balanced.

There was no rule that the Court was bound to confirm a magistrate's decision on a point of fact, but in the present case the question was purely one of credibility, and he saw no reason why the Court should interfere with the judgment. The appeal would therefore be dismissed with costs.

[Appellant's Attorney, G. Montgomery-Walker; Respondent's Attorneys, P. Brink.]

SUPREME COURT.

WEDNESDAY, FEBRUARY 3.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

REGINA V. DU PLESSIS AND ANOTHER.

Liquor Licensing Act 28 of 1883, Secs. 75 and 77—Contravention—Conviction—Fine—Appeal.

Sir T. Upington, Q.C., appeared for the appellants, and Mr. Giddy for the Crown.

This was an appeal from the conviction of the accused by the Resident Magistrate of Calvinia, on a charge of contravening section 75 of the Liquor Licensing Act of 1883. The evidence given in the Court below was to the effect that the attention of the police was called to the fact that illicit liquor trading was going on at the farm Sieverfontein, and that upon an examination of the farm a number of people were found there in an intoxicated state. The accused stated that they had two ankers of brandy, and had given their friends some, but had sold none. An anker of brandy was found hidden in the loft of a neighbouring farmhouse, where it appeared to have

been dealt with secretly, while evidence was given that three natives came to the farm a three-hours' journey with money to buy brandy. For the defence evidence was given that the brandy was presented to the farmer upon whose premises it was found by the accused, who had come to the farm to buy horses. The appellants were found guilty and sentenced to pay a fine of £5. From this sentence the appellants now appealed.

Sir T. Upington, Q.C., for the appellants, contended that there was no evidence whatever to support the conviction. The Magistrate had admitted an amount of hearsay evidence, which ought not to have been admitted, and on that evidence he formed certain conclusions, which no doubt led him to convict. The facts were no doubt suspicious, but there was not a tittle of evidence that the appellants had sold the brandy. Counsel referred to the case of "*Fullerton v. The Queen*," 4 H.C., 245.

The Chief Justice: I do not agree with the judgment in that case.

Mr. Giddy pointed to the suspicious nature of the facts and referred to section 77.

The Chief Justice, in giving judgment, said that the first objection taken on behalf of the appellants was that there was no evidence against Henry du Plessis, but the appellants must stand or fall together. What was done was the joint act of both. The next question was as to whether the Resident Magistrate was justified in coming to the conclusion that the transaction was in the nature of a sale. But for section 77 of the Act of 1883 there might be difficulty in concluding that the Magistrate was right, but that section placed the matter beyond doubt. It had been said that that section applied only to licensed victuallers, but that was only so with regard to the concluding part of the section. It was proved that these two men had brought brandy all the way from the Paarl, and that the labourers on two farms were supplied with drink. Was it likely that the accused had presented liquor to their friends to be given over to the farm servants *gratis*? When the brandy was found in the loft there was some concealment attempted, and all these circumstances taken together justified the Magistrate in coming to the conclusion that the transaction was in fact a sale. The appeal must be dismissed with costs.

[Plaintiff's Attorneys, Gus Trollip and P. M. Brink.]

HARCOMBE AND RYLANDS V. BRYANT BROS.
Account—Balance—Action—Work done and material supplied—Brick-making machinery—Foundations—Alleged defective workmanship—Damages—Counterclaim.

Mr. Jones for the plaintiffs; Mr. Searle and Mr. Graham for the defendants.

Mr. Jones applied for the postponement of the case on the ground of the illness of Mr. Schreiner, leading counsel for the plaintiffs.

The Court declined to grant the application, and the case was proceeded with.

This action was instituted by Harcombe & Rylands, engineers, of Cape Town, against Bryant Brothers, brick manufacturers, to recover the sum of £44 19s., being the amount of a balance of account for work and labour done, moneys expended, and material supplied by the plaintiffs from the period between December, 1890, and June, 1891. The whole amount of the account rendered by plaintiffs was £487 4s. 10d., towards which they had received £392 5s. 10d. In December, 1890, when the transactions commenced, the plaintiffs agreed with the defendants to import an engine for them, to be used for brick-making purposes, for a commission of 5 per cent., the defendants to pay freight and dock dues. It was afterwards agreed that the plaintiffs should erect the engine and certain machinery. This was done, and plaintiffs rendered their account, the balance of which remained unpaid. Defendants denied the correctness of the balance, and claimed in reconvention the sum of £887 8s. 2d., for damage alleged to have been sustained owing to the defective manner in which the engine and plant were erected. Upon these pleadings issue was joined.

Mr. J. B. Harcombe, one of the plaintiffs, deposed that the engine was valued at £850, and was to be erected with the plant near the Kloof-road Cape Town. The charges in the account rendered to the defendants were all fair and reasonable, and the work had been properly done by witness's firm. The plant was erected under the personal superintendence of Mr. Cecil Bryant, one of the defendants.

By Mr. Searle: He was not aware that the engine and plant had been defectively erected. Defendants had complained of the way in which the work was done but declined to particularise, although asked to do so. A great number of alterations were made in regard to the fixing of the machinery, but they were done at defendants' request, and not on account of any bad workmanship by witness.

For the defence,

Mr. H. E. O. Bryant, one of the defendants, gave evidence that when the brick-making machinery arrived he handed to Harcombe a printed paper of instructions as to its erection. As soon as work was commenced the machinery, as erected by the plaintiffs, was a perfect failure. The engine vibrated terribly, and the bands were always slipping off. Witness had the machinery taken down and replaced, and was

turning out excellent bricks at present. He was selling all the bricks that were made, and as there was a brisk demand at the time when the business commenced, he considered that he had lost a large sum of money owing to the defective workmanship of the plaintiffs.

By Mr. Jones: It was not true that witness refused to cover the machinery. It was placed under a shed as soon as possible after erection.

Mr. Cecil Bryant, the second defendant, gave evidence of similar purport, and said that the machinery wholly refused to act after the plaintiffs had set it up. Before witness and his brother had the machinery taken down and re-erected only 716 bricks a day were turned out, whilst at present the average daily turn-out was 10,000 to 12,000. There was not now any trouble with the machine.

By Mr. Jones: It was not true that the machinery had deteriorated because witness left it uncovered. It was always covered.

Mr. J. A. Williams, locomotive foreman at Salt River, said he inspected the defendants' machinery in October last. It was then working very badly, but since it had been re-erected it worked satisfactorily. The whole of the bad work had been caused owing to the want of a proper foundation. It was possible that the machine was put down correctly, but when the weather was wet the foundation would give and the machine work imperfectly.

SUPREME COURT.

THURSDAY, FEBRUARY 4.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL

UNION BANK V. DU TOIT.

Mr. Watermeyer moved for final adjudication of the defendant's estate, which was granted.

CLEGHORN AND OTHERS V. LEVYNO BROS.

Insolvency—Meaning of that term—Act 38 of 1884, Sec. 3—Provisional order discharged.

Mr. Moltene moved that the provisional order already granted be made absolute.

Sir T. Upington appeared to oppose, and said that the case would raise the question of what was the actual meaning of the term insolvent under section 8, Act 38 of 1884. Counsel read an affidavit to the effect that when the provisional order was granted no writs had been executed against the respondents, and that if the estate were realised there would be a considerable surplus after payment of creditors.

Continuing counsel said that the affidavit, upon which the order was granted, showed clearly that the respondents were insolvent, and the petitioners alleged that the respondents had themselves advised sequestration of their estate for the general benefit of creditors. The respondents, however, now filed affidavits alleging that they were not insolvent, that no writs had been executed against them, and they denied that they had advised sequestration for the benefit of their creditors. Their assets exceeded their liabilities, and if they were realised by liquidation a profit would be obtained, which in insolvency proceedings would only be frittered away in costs.

Mr. Moltene mentioned that the plaintiffs resided at Port Elizabeth, and the defendants at Uniondale. The defendants' affidavit was only served yesterday at noon, and there had been no time for the plaintiffs to answer it.

The Chief Justice:—Isn't the firm domiciled in Cape Town.

Mr. Moltene:—No, the firm is Cleghorn, Harris & Stephen, of Port Elizabeth.

Sir Thomas Upington observed that great power was given by the third section. If the meaning of insolvent was that although the firm of Levyno Bros., having assets exceeding in value the amount of their liabilities, were yet not in a position to meet engagements which fell on them from day to day, then he was obliged to admit that the order should be made absolute against them.

The Chief Justice remarked that it had been continually decided in cases before the Court that before an estate was made insolvent, there must be clear proof of insolvency and a deficiency of assets. There must be the clearest proof that the liabilities were greater than the assets.

Sir Thomas Upington submitted that the affidavits showed that the value of the assets was more than the liabilities. Counsel referred to—*In re Du Toit* (2 Juts iii).

The Chief Justice, in giving judgment, said he did not see that any good purpose would be served by postponing the hearing of the case. Certain statements had been made by the petitioners to the effect that they had been informed by the firm of Levyno Bros. that they were unable to meet their liabilities and unless their estate was sequestrated certain creditors would obtain a preference. Well, there was a distinct denial of such a statement, and no good could be gained by

allowing the plaintiffs to answer the affidavit because they could only repeat what they had said, and the Court would be no wiser. The Court had repeatedly in these cases said that under Ordinance 6 of 1843, the greatest facilities were given to creditors to obtain sequestration of their debtors' estates. One of those means was by obtaining judgment against the debtor, and issuing a writ, and if a return was made of *nulla bona*, sequestration was granted. But where the creditor relied on the Act of 1884, and applied to a Judge in Chambers for a provisional order, he did so at his own risk. It was a *prima facie* statement which the Judge accepted, but if evidence were given to rebut that statement, then the Court as a matter of course would set the sequestration aside. In the present case there was clear evidence rebutting that *prima facie* statement, and the Court would consequently set aside the provisional order, with costs. By the term insolvency, under the Act of 1884, was meant that the assets were less than the liabilities.

HALL AND CO. V. ESTERHUYSEN.

Mr. Molteno moved for judgment for the sum of £193 3s. 2d., for goods sold and money lent. Judgment was granted.

ADMISSIONS.

IN RE HUTTON.

On the motion of Mr. Graham, Mr. Herbert Beever Hutton was admitted to practise as an attorney and notary.

IN RE PRESTON.

Mr. Juta moved for the admission of Mr. Thomas H. Preston as an attorney.—Mr. Preston took the oaths, and was duly admitted.

REHABILITATION.

On motions from the bar, the Court granted the rehabilitations of Lambert Johannes Colyn Osmond and Holford Willard Bean.

THE MASTER V. CONWAY.

De lunatico inquirendo—Act 20 of 1879, Sec. 2—"Dangerous lunatic"—Doctors' certificates—Magistrate's warrant—Illegal detention—Maintenance as a pauper patient—Funds in hands of Master—Costs.

Mr. Giddy for the Master; Mr. Watermeyer appeared as *curator ad litem* for the defendant.

This was an application to have James Robert Conway declared of unsound mind, and for the appointment of a curator of his person and property.

Dr. Cox, medical officer in charge of the Old Somerset Hospital, deposed that he had Conway under his control since April 28, 1891. Conway was admitted on the usual medical certificate and the Magistrate's statement. He was unfit to take care of his property and person.

By Mr. Watermeyer: Conway was not a dangerous lunatic except to himself. He was not violent or suicidal. He was getting worse, and required a great deal of looking after. The direct cause of insanity, he believed, was drink, and the man was becoming a general paralytic.

Mr. Giddy stated that the amount due to the lunatic, and in the hands of the Master, exceeded £860.

Mr. Watermeyer called Robert James Conway, son of the lunatic, who stated that his father owned three houses. Witness was prepared to take care of his father, and live in the same house with him.

Mr. Watermeyer objected to the mode in which the lunatic had been dealt with by the police authorities. All that the man had done, he said, was to leave his house at night clad only in his nightshirt. For that he was arrested and conveyed to the hospital as a criminal lunatic, and had been kept there since. Counsel referred to Act 20 of 1879 and submitted that Conway's arrest and subsequent detention were both illegal. The provisions of the Act had not been complied with. There was nothing in the doctor's certificate to show that Conway was a dangerous lunatic nor was there any proof that he was a criminal lunatic.

Mr. Giddy said that the Magistrate had issued a warrant, and a medical man had certified that Conway was inclined to be violent.

Mr. Justice Smith: Have two medical men given evidence upon oath that the man is a dangerous lunatic?

Mr. Giddy said that was not necessary in view of the Magistrate's order.

Mr. Watermeyer said that the man had been treated as a pauper patient, and his children had been expecting, ever since his incarceration, that he would be released. The amount from the house property was only 85s. per month. The defendant ought not to be made to pay for his maintenance during the period of his illegal detention.

The Chief Justice: Here is the medical men's certificate, but where is the warrant of the Magistrate? I cannot find any such document. There has been no warrant issued under the Act. Was this committal before Miss Arthur's case?

Mr. Giddy: Yes, my lord.

The Chief Justice: The mode of proceeding has been changed since then, I believe.

Mr. Giddy admitted that there was no magistrate's warrant for confinement, but said that the Under Colonial Secretary had issued a warrant under which Dr. Cox received the lunatic.

The Chief Justice, in giving judgment, said it was common cause that the man was of unsound mind, and the Court would therefore declare him so. The Court was of opinion that the man should be restored to his family, who were anxious to have him, and would therefore appoint his son, Robert James Conway, curator of his person and property, but the money in the hands of the Master would remain there, and interest only would be paid to the curator. Costs would come out of the money in the hands of the Master. There was the further question of whether the Court should make an order for the payment for the keep of the lunatic at the Old Somerset Hospital. He was of opinion that no such allowance should be made. The man had been kept there as a pauper, and one who was not expected to pay for his maintenance. The Court was not at all satisfied that the defendant had been legally detained at the hospital. The practice had been adopted which was followed in Miss Arthur's case. A warrant was issued for the detention of the alleged lunatic without the proper authority of the Magistrate, and without even such a certificate from the doctors as the Act required. He understood that since Miss Arthur's case the practice had been changed, and the Court would therefore not further comment on that part of the case. The man had been kept as a prisoner, and it was not right that his estate should suffer. His Lordship added that if the lunatic became violent his family could send him again to the hospital.

HARCOMBE AND RYLANDS A. BRYANT BROS.

Mr. Jones appeared for the plaintiffs; Mr. Searle and Mr. Graham for the defendants.

The hearing of this case was resumed. Evidence in support of the claim in reconvention was continued.

Mr. C. J. Wood, C.E., said he had examined the machinery. A gross error was committed when the erection originally took place, the ponderous machinery having been placed on a clay foundation, instead of on concrete. The plant had now been re-erected, and was working excellently. On one occasion witness saw it turn out at the rate of 20,000 bricks per day, and the average turn-out was 10,000 to 12,000.

By Mr. Jones: His inspection was made in October last. He had not himself erected any brick-making machinery.

Several workmen in the employment of Messrs. Bryant having given evidence,

Mr. Cunningham, of the firm of Cunningham & Gearing, stated for the plaintiffs that he inspected the machinery at the request of Mr. Cecil Bryant in July last. The machinery was working properly, and the engine and machine were perfectly square.

By Mr. Searle: He was asked to go up because Messrs. Bryant complained of the foundation. When witness saw the machinery at work he did not consider it necessary to lay a new foundation.

Mr. J. B. Harcombe, re-called, said that it was at the distinct request of Mr. H. E. Bryant that clay foundations were used instead of concrete for the machinery.

After argument,

The Chief Justice gave judgment. He said there could be no doubt that it would have been better if the plaintiffs had fixed a concrete foundation for the plant, and if it had been proved that the defendants told them to put in such a foundation he did not think the plaintiffs could have recovered anything in respect of the work. The real question to be determined was one of fact, namely, whether or not the defendants dispensed with a concrete foundation. According to the evidence of the plaintiff Harcombe, he pointed out to the defendants that a concrete foundation would be safer, but when it was also pointed out what the expense would be the defendants said they would do without the concrete foundation. Now, if the machinery had been entirely useless without a concrete foundation it would have been the duty of the plaintiffs to have refused to lay the machinery down at all unless with a concrete foundation, but it was impossible to go that length. The only person who had really an interest in not having a concrete foundation was the defendant. The plaintiffs had nothing to gain by failing to put down a concrete foundation. Under those circumstances judgment should be for the plaintiffs. There was one other remark he wished to make. An application was made on Wednesday on behalf of the plaintiffs for a postponement on account of the illness of the senior counsel, and he said at the time that the junior counsel would do full justice to the case. What he said had had been fully supported, because Mr. Jones had done full justice to the case, but it only showed that if the application had been acceded to the plaintiffs would have had to pay, in the costs of the day, a sum nearly as great as that for which the Court now gave judgment for them. Judgment would be for the plaintiffs for £48 7s. 6d. with costs, judgment would also be given for them on the claim in reconvention.

[Plaintiffs' Attorneys, Messrs. van Zyl & Buissinne; Defendants' Attorney, D. Tennant, jun.]

SUPREME COURT.

FRIDAY, FEBRUARY 5.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

SOUTH AFRICAN ASSOCIATION V. VAN STADEN.

Farm—Action to compel delivery of possession—*Bona fide* possessor—Latent rights—"Right to ownership"—Prescription—Act 28 of 1881, Sec. 2—Mortgage bond—Judgment—Execution—Sale *ex decreto judicis*—Notice—108th Rule of Court—Interdict—Damages—Costs—*Lange v. Liesching* (Foord 55) discussed.

Where a *bona fide* possessor of land, who had acquired a right to ownership by prescription, but had not completed his title by registration, had stood by and without protest had allowed the land to be sold in execution of a judgment, the Court held that the purchasers of the land in question were not to be prejudiced by any latent rights held by the *bona fide* possessor but of which they (the purchasers) had had no notice.

Per De Villiers, C.J.—Under our system of registration a right by prescription does not vest the ownership itself in the person who has acquired that right, it rests with him to complete his title by registration. It still continues an entirely latent right and in my opinion the holder has no greater right than for instance a fidei-commissary heir who has a tacit hypothec on the property.

Until he has completed his title by registration he has a mere right of ownership and not the ownership itself.

Mr. Juta and Mr. Castens appeared for the association, and Mr. Searle and Mr. Watermeyer for the defendant.

This was an action to compel the defendant to give up possession of the farm Kromme Poort, situated in the division of Uitenhage, for an interdict, and for £500 damages.

The declaration alleged that on or about 15th January, 1887, the plaintiffs obtained judgment against one M. W. Viljoen, the registered owner

of the farm Kromme Poort, situated in the division of Uitenhage, for the sum of £3,500 upon a mortgage bond specially hypothecating *inter alia* the aforesaid farm, and the said farm was at the time declared executable. That notice of the said attachment was given to the defendant, who was residing on portion of the said farm, and thereafter the said farm was legally sold in execution under the said judgment by auction and was bought by the plaintiffs, and on the 6th August, 1890, transfer thereof was duly passed to the plaintiffs. That thereafter the plaintiffs gave defendant notice that he must quit and leave the portion of the said farm, but the defendant at first refused to quit or to give up the occupation thereof. That thereafter the defendant agreed to give up possession of the said land upon receiving compensation for a building which he had erected on the said land, and the plaintiffs thereupon offered the defendant the sum of £50, or to allow him to remove the materials of the said house, all of which the plaintiffs are still ready and willing to do. That thereafter the defendant refused to be bound by, or to abide by his said undertaking, and still refuses to quit the said land or to give up possession thereof, but has remained in possession thereof, and has wrongfully and unlawfully trespassed upon the said farm and cultivated and worked it for his own benefit, and claims the right to do so. That by reason of the premises the plaintiffs have sustained damages to the extent of £500. Wherefore the plaintiffs prayed :

(a) For an order compelling the defendant to quit and give up possession of the said land.

(b) For an interdict restraining the defendant from again trespassing upon the said farm.

(c) For the sum of £500 as and for damages as aforesaid.

(d) Costs of suit.

The defendant in his plea admitted that on the 15th January, 1887, M. W. Viljoen was the registered owner of the farm Kromme Poort, but said that the said Viljoen was not then in law, the owner of so much of the said farm as is the property of the defendant as hereinafter set forth. Defendant admitted that judgment had been obtained against the said Viljoen, but said he was no party to the said suit, and was not bound in law by the said judgment. The defendant admitted the sale of the farm in pursuance of the said judgment, and the transfer to the plaintiffs as purchasers on 6th August, 1890 but he said he was no party to, and was not bound by, such proceedings and transactions. He admitted having received notice to quit, as well as his refusal to quit and give up possession of the farm. The defendant specially pleaded that the farm Kromme Poort, being the remaining extent of the farm Kuyne, was lawfully purchased by him and

the said Viljoen jointly in the year 1855, but that the farm was in error registered in the name of the said Viljoen solely. That he entered into occupation and possession of his portion of the said farm Kromme Poort so purchased, and thereafter continued as of right and *pro domino* to occupy and possess the said portion for a period of thirty years and upwards, and that by reason of the premises he had perfected by prescription his title as owner to the said portion of the said farm, notwithstanding the aforesaid erroneous registration of the said farm in the name of the said Viljoen solely. That on the 23rd July, 1891, the defendant's attorneys, in ignorance of the fact that the defendant had by prescription perfected his title to the said portion of the said farm, proposed in writing to the plaintiffs' attorneys that the defendant should give up possession of the said farm upon receiving compensation from the plaintiffs for improvements effected thereon by the defendant, such improvements to be valued by arbitration, but, the plaintiffs did not accept the proposal so made in error as aforesaid; the said proposal was, on discovery of the error, withdrawn, and no such agreement as is referred to in the concluding portion of paragraph 4 of the declaration was ever entered into. He denied that he was bound by any undertaking, as alleged in the 5th paragraph of the declaration, and admitted that he refuses to quit the said land or give up possession thereof; that he remains in possession thereof, and that he has cultivated and worked, and claims the right to cultivate and work, the portion of the said farm referred to in his plea. Wherefore he prayed that plaintiffs' claim might be dismissed with costs.

For a further plea, should the above plea be deemed insufficient, but not otherwise, he said that he had effected permanent improvements on portion of the said farm so *bona fide* occupied and possessed by him as aforesaid, and that the said improvements are of the value of £800 sterling, and he submitted that in no case could the plaintiffs succeed in this action, or compel him (the defendant) to quit or give up possession of the said portion of the said farm without first paying, or tendering to pay, by way of compensation, the said sum of £800 sterling.

The defendant claimed in reconvention:

(a) A declaration that he was entitled as lawful owner of the portion of the said farm so occupied and possessed by him as aforesaid since the purchase thereof in 1855, or in the alternative, should the above claim be dismissed, but not otherwise,

(b) A declaration that he was entitled to receive from the plaintiffs the sum of £800 sterling as and for such compensation as aforesaid.

(c) Costs of suit.

Upon these pleadings issue was joined.

Mr. A. P. de Villiers, Deputy Sheriff of Uiten-

hage, gave formal evidence as to the sale of the farm, and stated that before the sale took place he spoke to the defendant, and warned him that if, as he claimed, he was part owner of the farm, then was his time to protect his interest and obtain an amendment of the transfer. He valued the farm Kromme Poort at £800, including the homestead. He considered that £50 would compensate the defendant for the improvements he had made.

By Mr. Searle: Defendant made no protest whatever at the sale.

The defendant (Mr. C. J. van (Staden) stated, in answer to Mr. Searle, that he first came into occupation of the farm by purchasing it from one Bagot, jointly with Viljoen, in the year 1855. Payment was not made in cash, but by instalments, the first (£27) being paid directly by witness to Bagot in the presence of Viljoen. Afterwards he paid other instalments, but those were all paid to Viljoen. Witness paid £200 in all. His share was two-thirds, and Viljoen's one-third. The house property witness had erected on the farm he valued at £350. It was two or three years ago that witness first became aware that his name did not appear in the original title of the farm. Before that he had no idea there was anything wrong. He never had any of title deeds, Viljoen keeping all the documents, but he (witness) paid the rates, and was registered in the Divisional Council books as the owner of the farm. He did not know Viljoen had passed a bond over his share of the property. Viljoen absconded to the Transvaal several years ago and was now dead.

Evidence taken on commission was read. It included the testimony of Mr. Bagot, the original owner, who deposed that Viljoen and Van Staden were the joint purchasers, and that the first instalment was paid by Van Staden.

Mr. J. P. Bellingan, M.L.C., stated that Van Staden had lived on the farm over thirty years to his knowledge, and that the house on the farm could not have been built for less than £100, whilst the dam was worth £200. He concluded that Van Staden's share of the farm was worth £750. Viljoen had admitted, in deponent's presence, that Van Staden was part owner of the farm, and that he could not understand why his name had been omitted from the title deed.

Mr. H. N. Chase, secretary of the Uitenhage Board of Executors, deposed that Viljoen told him, in Van Staden's presence, that the farm had been purchased jointly, and that Van Staden was one of the legal owners of the property.

Mr. Juta, in argument, referred to Voet (6, 1, 18), and contended that it was clear law that if an owner of property stood by and allowed his property to be sold in a judicial sale without protest, he could not afterwards vindicate the right he originally possessed. The same principle

applied to servitudes (Voet 8, 6, 14). The Court had already adopted that principle, and although the case undoubtedly pressed hardly upon the defendant, he contended that the Court was called upon to protect the rights of the plaintiffs. The defendant had allowed the sale to go through and had never raised a finger, and he could not now be heard to say that the sale was an illegal one. The plea of prescription could not avail, because when the bond was registered the period of prescription had not elapsed. The association was quite willing to give up the farm on payment of the £800, and it was a pity that Mr. Van Staden did not accept the £50 which was offered by the plaintiffs. Counsel referred to "*Lange v. Liesching*," Foord, 66.

Mr. Searle, for the defendant, contended that the period of prescription had as a fact been completed, since the prescriptive title commenced in March, 1855. Even if the period of prescription were not completed, he submitted that the passing of the bond, under the circumstances, did not break prescription.

The Chief Justice: Then how is a mortgagee to protect himself?

Mr. Searle said he saw the force of the remark, but there were many similar cases of hardship.

The Chief Justice: Ought we to increase them?

Mr. Searle referred to: "*Van Schalkwyk v. Hugo*," Foord, 89.

The Chief Justice: When the defendant's title to the ownership had been acquired, ought he not to have applied to the Court under the Act of 1881?

Mr. Searle confessed that that would have been better, but said that the defendant had acted in good faith, believing that he was the legal and acknowledged owner and that no one could interfere with his rights.

Mr. Justice Smith: Did the mortgages know of the circumstances?

Mr. Searle said that if they did not everyone else in the district did know, and regarded Van Staden as the owner. There was no principle of our law by which the defendant was bound to come to the Court immediately the period of prescription was completed, or otherwise to lose his rights. Defendant was not a very clever man, and did not protest against the sale because he believed that what was being sold was Viljeen's share of the farm, not his portion. Counsel referred to "*Saayman v. Le Grange*," B. 1879, p. 10.

The Chief Justice: I would like to know from the Sheriff what course would be taken in a case where a person claiming a right by prescription raised objection to a sale.

The Sheriff said that in the present case Van Staden was supplied by registered letter with a

notice of sale and a description of the property, which included the very land now in dispute.

The Chief Justice: But if he had objected, then you would have stepped the sale pending an investigation?

The Sheriff replied in the affirmative.

Mr. Searle said his client never received the Sheriff's notice. Counsel proceeded to argue that it was the plain duty of the mortgagees to have inquired who was the real owner. It seemed to him that whether Van Staden was owner or not, he was the *bona-fide* possessor, and had improved the property very materially. Defendant allowed the sale to go through without protest because he believed that his property could not be sold, and he contended that under those circumstances he was entitled to judgment at least for the value of the improvements which he had effected on the land (*Bellingham v. Bloommetje*, Buch. 74—p. 86.)

The Chief Justice, in giving judgment, said. Some interesting questions of law have been raised in this case, but it is only necessary to deal with those which arise out of the facts actually proved. It is clear from the evidence that in 1899 the plaintiffs purchased the property in question at a sale in execution. It has been argued that the plaintiffs should not be treated as ordinary purchasers at a sale in execution, inasmuch as they were the mortgagees at whose suit the execution took place. In my opinion that fact could not in any way affect the rights of the plaintiffs. They could be in no better position, by reason of their having been prior mortgagees, but they could also be in no worse position. They must be treated as if they were outsiders, who purchased the property at a public sale in execution. Having so purchased it, the question arises whether the defendant can set up latent rights which he had acquired before the plaintiffs became the purchasers of the farm. The latent rights are first of all a right to the ownership acquired by prescription, and a tacit right to compensation of the value of the improvements which the defendant had made on the land. In regard to the claim by prescription, under our system of registration a right by prescription does not vest the ownership itself in a person who has acquired that right, it rests with him to complete his title by registration, it still continued an entirely latent right, and in my opinion the holder has no greater right than, for instance, a *fidei-commisary* heir who has a tacit hypothec on the property. Until he has completed his title, he has a mere right to the ownership, and not the ownership itself. The law has safeguarded the rights of persons interested in a property sold in execution, different rules being laid down for observance by the Sheriff. Due notice has to be given to any person interested, who may attend before the Sheriff, either

personally or by an agent, and object to the sale. Under the 108th rule of Court, it is competent to any person to object to the sale, and from the answers given by the Sheriff I gather that if, at the meeting held at his office, any objection had been raised by the defendant, probably the sale would not have taken place, at all events, without full inquiry. Every protection was therefore given to a person in the position of the defendant. It was proved that in the present case all the conditions of the law had been complied with. Not only was written notice of the sale sent to the defendant, but he had actual notice as well from Mr. De Villiers, the deputy-sheriff. No objection at all was raised by the defendant, and it was quite in accordance with the decision in the case of "Lange v. Liesching" to say that under such circumstances the purchasers acquired the whole right to the property, free from any latent incumbrances which the defendant might have. The remarks which I have made about prescription apply also in regard to the improvements made by the defendant. It certainly seemed a case which pressed hardly upon the defendant, because he had for many years lived on the place and regarded it as his own, but at the same time it seemed most extraordinary that he did not acquire his title, because, as a rule, our Colonial farmers are most careful to see that their transfer deeds are in due form. It would have been even more hard for the association if the case had gone against them, because they bought this property in the belief that there was no latent claim upon it, and from the acts of the defendant they could not have supposed that after the sale he would set up a claim. The plaintiffs have tendered £50 for improvements, and as the tender was made they were bound to abide by it. It was a generous act on their part to make the tender, and it would have been still more generous not to have pressed the claim for damages, but they had agreed to accept £25 for the defendant's use and occupation of the property. Judgment would be for the plaintiffs in terms of the prayers A and B of the declaration, except as to damages, the plaintiffs paying the defendant £50 for improvements, and the defendant paying the plaintiffs £25 for his use and occupation of the farm.

Mr. Searle, on the authority of "Alexander v. Armstrong," Buchanan's Reports, 1879, p. 288, contended that the case ought to have been decided on exception to the plea, and that the plaintiffs therefore were not entitled to further costs than they would have been entitled to if the case had been decided on the exception.

Mr. Juta submitted that the case could not have been decided on exception.

The Chief Justice said it was very inconvenient to hear the argument by instalments; all questions

arising in the case should be argued at once. In the present case he saw no reason for departing from the rule that costs should follow the judgment.

[Plaintiffs' Attorneys, Messrs. Wesels & Standen; Defendant's Attorneys, Messrs. van Zyl & Buissinne.]

GENERAL MOTIONS.

THE PETITION OF WESSEL H. ZIETSMAN AND OTHERS.

Mr. Sheil moved to make the award in the matters between the parties a rule of Court, and to authorise the guardian of the minor children concerned to execute the deeds of transfer of the property, and to sign all the necessary documents for conveyance of the same.

The order was granted.

SEARLE V. STANDER AND ANOTHER.

Mr. Molteno moved to make absolute the rule nisi declaring certain four lots of ground situated in the village of George executable in respect of a judgment of this Court.

Mr. Juta appeared for the respondents, and said that the property in question had already been sold in a *bona-fide* manner to one Anderson, whose affidavit he read.

The Chief Justice was not satisfied that Anderson had made out a prior claim, and the rule would therefore be made absolute, but with costs against Stander only.

Mr. Molteno applied for a similar order in several other cases against the defendant, which was granted.

SUPREME COURT.

MONDAY, FEBRUARY 8.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

EKSTEEN V. EKSTEEN.

Mr. Searle for the petitioner; Mr. McLachlan for the respondent.

This was an action for divorce brought by the husband against the wife by reason of her alleged adultery. The petitioner resides at Salt River, where he is in the Government Railway Depart-

ment, and the respondent resides in Cape Town. The declaration stated that the parties were married in Cape Town in 1878 in community of property, and that there were two surviving children of the marriage, aged ten and seven years respectively. It was alleged that in 1888 and since that time the respondent had committed adultery with one Duncan McLeod (at Kimberley and other places), by whom she had had a child, and with whom she lived at present. The respondent admitted the marriage, but stated that the petitioner had been guilty of gross cruelty to respondent and her children; that he had on one occasion been fined for an assault on one of the children; and that he had attempted to poison the drinking water of the house in which respondent lived.

Petitioner, Rudolph Cloete Eksteen, stated that almost from the time when he was first married he had lived unhappily with his wife, who ran him into debt, sold his clothes, and lived at a rate he could not support. It was not true that he was fined for assaulting his child, it was his wife who was assaulted.

The Chief Justice: What were you found guilty of, not what do you say you were guilty of?

Witness: Well, the Magistrate said it was for assaulting the child. Proceeding, witness said he had seen his wife walking about with a stranger in Cape Town. He had not lived with her of recent years on account of what he had heard. He took the children away because his wife was under remand on a charge of stealing clothes. The children were in a filthy and neglected state, and he placed one in charge of his mother, and the other with his wife's mother. He was willing to support the children, for whom he now paid £2 a month. The children wished to stay with him. When he left Kimberley his wife did not wish to come to Cape Town. He offered her a railway pass, but she refused it. Since he had had the children one of them died, but it was not true that the death was due to neglect. The child died of pneumonia.

Mr. Justice Smith: There were six children; four of them have died, and the father has been charged with assault upon one of them.

Witness said he knew nothing of poisoning the water used by his family. The fact was that in Kimberley, where he had to pay 2s. 6d. a day for water, his wife gave it away, and he put some shoe-blackening in it.

The Chief Justice: Didn't you think that was very cruel to your children?

Witness said he could not afford to pay 2s. 6d. a day for water and have it given away.

Mr. McLauchlan: Is it true that you are in the habit of getting drunk?

Witness: Shall I answer the question, my lord?

The Chief Justice: Yes,

Witness: Well, yes, I generally get drunk.

Mr. McLauchlan: Did you never stab your wife?—No.

What did you earn in Kimberley?—£5 a week.

Had you money in the Savings Bank?—Yes.

Had you £100?—No; that's a lie. I had £4 10s.

How much did you leave your wife with?—£1.

Did you run away from Kimberley?—No; I walked away.

How many children did you leave your wife with at Kimberley?—Three.

Which she had to keep out of £1?—Yes.

What did you allow her a week?—£1.

To keep herself and three children?—Yes, and quite enough, too.

Did you know your wife had to go out as a servant after you left Kimberley?—No; I did not.

Did your wife ask you in 1889 to leave off your drunken habits, and she would live with you if you did?—She's a liar.

The Chief Justice: Remember that you are in a court of justice, and keep quiet. You understand?

Witness: Yes, my lord.

When you were in Kimberley were you not continually striking your wife?—Yes, I was, and she deserved it.

James Harding Voss, brother-in-law of the petitioner, deposed that he lived at a boarding-house in Pepper-street, where respondent, lived with McLeod as his wife, and occupied the same room with him.

This closed the case, counsel for the defence offering no evidence and admitting the adultery. The question, he said, upon which the respondent had come into court was as to the children. The respondent was strongly opposed to the petitioner being given the custody of the children.

The Court granted a decree of divorce, the children to remain in their present custody until a further order of the Court, and either parent to have access to them at reasonable times. The Chief Justice remarked that the petitioner was, by his own admission, an intemperate man, and probably if he had not been intemperate, but had behaved well towards his wife, she might never have fallen into error, but have remained a faithful wife, and not given rise to these proceedings. Still, his intemperance was no justification for her adultery, and the law gave the husband the right to a divorce on the ground of adultery if the wife committed herself as the respondent had done. He thought, however, that the misconduct of the husband at all events disentitled him to the prayer for the forfeiture of benefits on the part of the wife. If the husband had any estate one-half of it would be liable to pay Mrs. Eksteen's costs. There would therefore be no order as to costs.

[Plaintiff's Attorney, P. M. Brink; Defendant's Attorney, H. P. du Preez.]

PETITION OF JOHANNES J. JANTZEN.

Mr. Graham moved for an order authorizing the Registrar of Deeds to cancel certain mortgage bond, passed by petitioner on the 27th April, 1846, to secure the balance of purchase price of landed property bought from the insolvent estate of Jacobus A. Holtman, without production of a power of attorney in respect of one of the cessations of the said bond.

The order was granted.

PETITION OF HARRIET A. M. NIEKERK.

Mr. Searle moved for leave to sue by edictal citation in an action against petitioner's husband for restitution of conjugal rights, failing which for a decree of divorce.

The order was granted, personal service to be effected, and the citation to be returnable on the last day of term.

IN RE THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION.

Mr. Joubert moved for the sanction of the Court to the following compromises proposed to be effected by the official liquidators with shareholders and debtors:

Turpin, Walter L (Pretoria), £5,010 1s. 10d., offers £100 cash, already deposited, and all securities in the bank's possession.

Barber, Frederick Hugh (Johannesburg), £21,700, offers £500 cash, already deposited, and all securities in the bank's possession.

Marsh & Parker (Tarkastad), £1,291 5s 11d., offers 6s. in the £, in all £418 16s. 6d., already deposited.

Estate Mrs. Rykie Sophia Elliott (London), £1,470, offers debentures of £1,000 in the De Beers Consolidated Mines (Limited).

Mrs. Alida J. Saunders (Cape Town), £3,000, offers proceeds five shares in the Protecteur Assurance Company, and certain piece of land situated at Sea Point.

Mrs. Isabella Henderson (Scotland), £1,080, offers £250 cash, already deposited.

Thomas Child (England), £1,920, offers cash £250, already deposited, and certain shares in the bank's possession.

The order was granted.

Counsel also presented the fourth report of the liquidators and expressed regret that the report should have appeared in the newspapers before presentation to the Court.

The Chief Justice: The moral, Mr. Joubert, is, that you should first present your report to the Court and then to the newspapers.

The report was as follows:

1. The liquidators beg to present the following, their fourth report to your honourable Court, the last, or third report having been presented on the 19th May, 1891.

2. The liabilities of the bank now stand in the books at £2,050,728 14s. 8d.

3. The total amount of claims proved and admitted up to the 31st December last was £2,083,941 2s. 2d.

4. Two further dividends have been paid, namely, of 2s. 6d. in the £ each, on the 2nd June and the 16th November last, making a total of 16s. in the £, and this amount has been paid, or is payable, upon all claims admitted to date.

5. The total amount received on account of the call of £80 per share up to the 31st December last was:

From A shareholders	...	£880,764	19	0
" B "	...	2,582	1	8
		£883,287	0	8

The original estimate of the amount recoverable was £525,000. The liquidators do not anticipate that more than a small additional amount will be received under this head.

6. The premises and furniture at Johannesburg have been sold for £18,500. Several other landed properties held by the bank at Murraysburg, Queen's Town, Bedford, King William's Town, and East London have also been sold.

7. Under the powers conferred by your honourable Court, an arrangement was entered into with a debtor to the bank who held a disputed claim to a certain share in the Wesselson mine, whereby the bank should discharge the debtor upon receiving a cession of his claim, should maintain the claim at law, should dispose of the claim, and pay to the debtor half of any surplus which might remain due after payment of his debt to the bank. This action having been successful, resulted in a payment of the original debt due to the bank of £40,768 1s. 11d., which amount had been regarded of little value, and also of a sum of £11,000 as half share of the surplus above referred to.

8. The liquidators are engaged in proceedings to recover a further claim to a share in the same mine, under somewhat different circumstances.

9. The liquidators are glad to be able to report that the several negotiations with debtors in Cape Town and elsewhere to large amounts, by which an extension of time was given to them, accompanied in some cases by inspection of the liquidators, have resulted successfully, several large accounts having been finally closed.

10. Several other large accounts are still being kept open under arrangements made with the debtors who cannot pay at once, and who have preferred to endeavour to discharge their debts in full rather than surrender or seek to compromise.

11. The offices at all branches have been closed excepting Johannesburg, Kimberley, Pretoria, and Tarkastad. That at the last is kept open by one officer only, under special circumstances. The offices at Kimberley and Pretoria will be closed

on March 31 next. That at Johannesburg will be necessarily kept open for some time longer, in charge of the late manager at the Kimberley branch. At the other branches realisation is proceeding through the agency of the Standard Bank upon terms mentioned in our first report.

12. The liquidators have on a previous occasion, before the last dividend was paid out, deposited a large sum of money with the Standard Bank at a favourable rate of interest, and at the present time the sum of £50,000 is again so deposited, pending the accumulation of funds to pay a further dividend.

13. On the 31st December last an estimate was made of the value of the remaining assets of every kind, which amounted to about £800,000. It will readily be understood that this is necessarily very uncertain, and that the realisation may prove to be more or less according to circumstances. The liquidators would further observe that it is impossible to press the realisation in most cases without probable loss.

14. The liquidators now hope that a further dividend of about 8s. in the £ will eventually be payable, and that, should any considerable advance take place in the value of shares held in Transvaal companies, and improvement in the position of Transvaal debtors, some further small amount may even be paid.

15. The liquidators would call the attention of your honourable Court to the fact that the first year of their labours came to an end on the 28th of September last, and have to ask your consideration to the subject of their further remuneration. The sum of £1,500,000 having been collected and distributed, it might appear that the greater part of the work had already been accomplished. The liquidators, however, find that the time required to administer to best advantage the remaining securities and outstanding accounts is not in any degree lessened. Though the amount to be dealt with is smaller, the trouble and anxiety of collecting is equally great, and to be done efficiently will need time and care. If the liquidators may venture to regard the payment of £4,000, authorised by your honourable Court for the first year, as a provisional one, they would now, as on previous occasions, venture to suggest for your consideration whether a commission of, say, 1 per cent. upon the total amount realised, would not be a reasonable mode of arriving at an adequate scale of remuneration, such portion of the said commission as your honourable Court might direct to be drawn yearly, reserving the balance until the completion of the liquidation.

(Signed) David Mudie, Harry Bolus, John A. Reid, Hy. J. Feltham.

The Court made the usual order as to the publication and inspection of the report.

SUPREME COURT.

TUESDAY, FEBRUARY 9.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

DE BEERS CONSOLIDATED MINES, LIMITED V. THE COLONIAL GOVERNMENT.

Mining Area—Kimberley Mine—Contraction—Depositing floors—Debris—Tailings—Government Notice 613 of 1891—*Ultra vires*—Griqualand West Government Proclamation 6 of 1874—Griqualand West Ordinance 6 of 1880—Griqualand West Ordinance 21 of 1880—Government Notice 460 of 1886—Government Notice 529 of 1890—Act 19 of 1883, Secs. 18, 34, 59.

Mr. Richard Selomon, Q.C., Mr. W. P. Schreiner, Q.C., and Mr. Webber for the plaintiffs; the Attorney-General, Mr. Giddy, and Mr. Searle for the defendants.

This was an action instituted by the De Beers Co. against the Commissioner of Crown Lands and Public Works, as representing the Colonial Government, to recover possession of certain portions of Mining Areas 2 and 3, Kimberley Mine, contracted by Government Notice No. 613 of 1891, and for an interdict restraining the defendant from altering the said Mining Area or dealing with the debris and tailings.

The plaintiffs' declaration.

The plaintiffs are a joint-stock company with limited liability, duly registered and incorporated according to law, carrying on business in Kimberley. The defendant is the Commissioner of Crown Lands and Public Works, representing the Colonial Government in this action. The plaintiffs are the duly-registered owners and only workers of all the claims in a certain diamond mine, called the Kimberley Mine, situate on Crown lands, and have taken out titles to all the said claims, under Griqualand West Ordinance No. 6 of 1880, which vest in them the property in the soil of the claims in the said mine in perpetuity. Under and by virtue of Griqualand West Government Proclamation No. 6 of 1874, and Griqualand West Ordinance No. 21 of 1880, a certain area spoken of hereafter as the mining area round the said mine was surveyed and fixed by boundaries and set apart for the benefit of the claimholders in the mine for the purpose of depositing floors, tipping sites, and all

other matters and things connected with the proper and efficient working of the claims in the said mine. Alterations in the area were made by Government Notice No. 460 of 1886, with the consent and at the request of the Mining Board such alteration being required by the necessities of the mine, and a small portion of the area as altered, by the said Government notice was cut off and transferred by the defendant to the Borough Council of Kimberley in or about the month of June, 1889, with the consent of the plaintiffs, being at that time as now the only workers in and owners of all the claims in the said mine. The whole of the mining area for the Kimberley Mine as altered by the Government Notice No. 460 of 1886, was divided for the sake of convenience into three areas, called respectfully Mining Area No. 1, Mining Area No. 2, and Mining Area No. 3. By the provisions of Act 19 of 1883, the Kimberley Mining Board was vested with powers of management and control over the said mining area, which powers are defined by statutory enactments. In or about June, 1890, the Mining Board was dissolved by Government Notice No. 529 of 1890, in terms of section 59 of Act 19 of 1883, nine-tenths of the claims in the said mine being then owned by the plaintiffs. The plaintiffs contend that as the owners and only workers of all the claims in the mine they have the exclusive control, possession, and management of, the aforesaid area, and are vested with all the powers given to the said Mining Board by the statutory enactments in respect to the area. The plaintiffs further contend that the defendant, acting on behalf of the said Government, has no power to resume possession of any portion of the mining area, or to alter the boundaries of the area as defined by the aforesaid Ordinance 21 of 1880, or in any way to interfere within the area without the consent of the plaintiffs. The plaintiffs further say, alternatively, that if the defendant can legally alter the boundaries of the said area, or resume possession of any portion of it, he can only do so under the provisions of section 34 of Act 19 of 1883, if the necessities of the said mine require such alteration. At various times prior to the year 1880, and subsequently thereto, large quantities of soil out of the claims in the said mine, consisting of debris and tailings, were, in the course of their mining operations, deposited on portions of the said area (allotted for that purpose) by claimholders in the said mine carrying on such operations. The rights in the property to the soil so deposited by the claimholders, and the rights to search for and take for their own benefit the diamonds in the said soil, were from time to time purchased by the plaintiffs from the claimholders possessing the said rights, and the plaintiffs are now the owners of all the said debris and tailings in the area, and alone have the right

to search for and take for their own benefit the diamonds in the soil. On or about the 11th July, 1891, defendant gave the plaintiffs notice that the Government intended to resume possession of portions of the said mining area, and by Government Notice No. 618 of 1891 defendant gave public notice that "Mining Areas Nos. 2 and 3, Kimberley Mine, as defined by Government Notice No. 460 of 1886, and shown on the plan filed in the office of the Civil Commissioner of Kimberley, shall from the date thereof be contracted by deduction from such areas of the following floors, viz., Nos. 5, 7, 9, 11, 13, 15, 16, 17, 24, 33, 35, 36, 38, 39, 40." On the aforementioned floors are located large quantities of the debris and tailings, the property of the plaintiffs. The defendant, in his aforesaid capacity, intends forthwith to deal with the said debris and tailings as the property of the Colonial Government, and intends to issue permits for the washing and manipulation thereof without the consent of the plaintiffs. The contraction of the aforesaid mining areas by deduction of the floors referred to in the aforesaid Government notice is not required by the necessities of the mine, and the floors are necessary for the efficient and proper working of the claims in the mine by the plaintiffs. Wherefore the plaintiffs pray that it may be declared: (1) That the said Government Notice No. 618 of 1891 is *ultra vires* and invalid, and that the contraction of the said area by deduction therefrom of the said floors is unlawful. (2) That the plaintiffs, while owning all the claims in the said mine, and being the only workers of them, have the exclusive control and possession of the said mining area, and that the defendant cannot in any way alter the said area without the consent of the plaintiffs. (3) That the debris and tailings located in the said area, and especially such as are located on the floors referred to in the said Government notice, are the property of the plaintiffs, or that the plaintiffs alone have right to search for diamonds in the said debris and tailings. (4) That the defendant be interdicted from in any way altering the said mining area, or dealing with said debris and tailings, or otherwise. (5) If this honourable Court should hold that the defendant is legally entitled to resume possession of the floors in the said area referred to in the aforesaid Government notice, that the plaintiffs be allowed a reasonable time for the removal of the said debris and tailings.

The defendant's plea admits certain paragraphs of the declaration; and denies the allegations in paragraph 3, and says that there are about 150 claims not registered in the name of the plaintiffs, and for the terms of the tenure of claims held by plaintiffs, he craves leave to refer to the titles. He admits paragraph 5, save that he denies that that portion therein referred to as cut off from the

mining area by the Government was so out off with the consent of plaintiffs, and that at that date the plaintiffs were the only workers in and owners of all claims in the said mine. He denies paragraphs 9, 10, and 11, and for the true intent and meaning of section 84 of Act 19 of 1888 craves leave to refer to the terms thereof. He denies paragraphs 18 and 15, and says that a large portion of debris and tailings deposited by claimholders on the floors aforesaid was so deposited before 1880, and never was the property of the said claimholders, and with regard to such as was deposited after 1880 the same was thereafter abandoned by the claimholders, and was abandoned before the plaintiffs acquired the claims of the said claimholders, and none of the said debris and tailings ever became the property of the plaintiffs, but all belong to the Government. He denies paragraph 17, and says that the plaintiffs have apart from the floors so resumed amply sufficient space for the efficient and proper working of their claims, and that the said floors had not been used in connection with mining purposes for some time prior to their resumption by Government, nor had rent been paid in respect of them. He says that under sections 18 and 84 of Act 19 of 1888 the Government has power to resume possession of portion of the mining area and to alter the boundaries thereof, and that thereunder the Governor has power to make all such rules, orders, regulations, and bye-laws as he may deem necessary or expedient for the proper laying out, surveying, enlargement, or contraction of any mining areas or depositing floors. On or about the 28th June, 1891, certain bye-laws were duly approved of by the Governor and published in the *Gazette*, wherein the Commissioner of Crown Lands is authorised from time to time by notice in the *Gazette* to enlarge or contract the mining area, and to resume possession of any Crown land which has by such notice been excluded from the said area, and that thereunder the said Government Notice, No. 618 of 1891, was published. He says that the Government has the right under the circumstances above set forth to deal with the said debris and tailings situate upon the areas in Government Notice 618, referred to as their property, and to issue permits for the washing and manipulation thereof, without contradiction of any one. Wherefore he prays that the plaintiffs' claim may be dismissed with costs. And for a claim in reconvention the defendant, now plaintiff in reconvention, says: (1) He craves leave to refer to the matters above pleaded, and asks that they may be considered as herein inserted. (2) He says that the defendants in reconvention have entered into certain verbal agreements of lease with the plaintiff, whereunder the defendants occupy a large number of floors in the said mining area, the

area thus occupied far exceeding in extent one acre for each claim held by the defendants.

(8) The plaintiff is entitled to give defendants a month's notice in accordance with the said agreements to terminate their occupation of so much of the said mining area occupied under the said agreements as is in excess of one acre per claim and thereafter the plaintiff is entitled to resume possession of so much of the said floors as is in excess of the extent of one acre for every claim held by defendants, and plaintiff has offered and has always been ready and willing, and is now ready and willing, to treat with the defendants as to the position of the said acre per claim so remaining, and if necessary, to refer the question as to the site of the said acre per claim to arbitration, or to have the same determined according to law, but the defendants deny the rights of the plaintiff as above claimed.

The plaintiff in reconvention claims: (a) That it be declared that he has the right after due notice to resume possession of so much of the said area as is in excess of one acre for every claim held by defendants in reconvention, and to deal with the debris and tailings upon the portions of the areas so resumed as Government property and to issue permits for the washing and manipulation thereof. Or in the alternative (b) that it be declared that he has the right to remove the said debris and tailings out of the said area for the purpose of dealing with and disposing of it outside of the said area.

Upon these pleadings issue was joined.

Mr. W. H. Craven, secretary of the De Beers Consolidated Mines (Limited), was the first witness. He stated that he was formerly a director of the Central Company before the property of that company was sold to De Beers, and had been connected with the mining industry at Kimberley since 1871. The De Beers Company owned all the claims in the Kimberley Mine, and possessed quit-rent title. The company paid rent upon all depositing floors save those the Government now intended to resume, and rent for the latter was proffered before the present action was thought of. He believed there were about 4,367 claims in the Kimberley Mine. As secretary of the company, he knew of no mining regulation restricting each claim to one acre in extent. From the earliest time he had never heard of such a restriction. All of the floors upon which the company paid rent were not at the present moment in actual use for depositing, but they might be needed at any time. The company deposited blue upon ground leased from the Government outside the mining area. It was a condition of the lease that the company should not give up the ground unless other ground was pointed out for its use, and so far as witness knew there was really no other

ground available but that now in use. If the lease of that ground were terminated, the areas in dispute, Nos. 1, 2, and 3, would be at once required for mining purposes, and would not indeed be sufficient for requirements. The mining area was proclaimed in 1874, and in 1882 a Mining Commission was appointed by the Government with regard to the Kimberley Mines. The report was acted on in 1886, when certain changes were made, based on the report of the Commission. The Commission was appointed with the approval of the then Mining Board. The Kimberley Mining Board practically ceased to exist in June, 1889, at which time De Beers owned the whole of the mine. At the time when rent was proffered for the floors now in dispute the, Government had in no way intimated an intention to resume possession of the areas. It was not till 1891 that he saw a proclamation to the effect that the Government would resume possession, and he immediately sent in a protest and said that the company would contest the matter. The tailings on the floors which the Government wished to obtain possession of were not of much value. Witness went on to state that Areas Nos. 1 and 2 were absolutely necessary in order that the company should carry on its business, and said that upon one there were several buildings, whilst upon the other there was a great deal of reef, &c. A mechanical haulage plant was being laid along the areas. Asked with regard to the possession of tailings, the witness said that so long as he could remember the Mining Board never for a moment claimed the right to deal with tailings. When he was a director of the Central Company, applications to wash the company's tailings were often received. On one occasion a large sum of money was offered for the right to wash the company's tailings. No person would have been allowed to wash the tailings without leave of the owner.

By the Attorney-General: The Central Company most distinctly valued its tailings as an asset. The De Beers Company bought the Central Company out for £5,378,000, in 1889. There were very few cases indeed in which an owner abandoned tailings. They were a substantial asset. He did not think any part of Area No. 3 was at present used for mining purposes, but a portion of the company's compound was upon Area No. 2. If the Government would admit the company's right to the ground, the company on its side had no objection to giving up the debris in Area No. 3, but not on the others. A large rock shaft went down No. 2 area.

Mr. W. McHardy, floor manager at De Beers, and general manager of the Central Company before the amalgamation, said that the company required the whole of Area No. 2 for ordinary mining purposes. The floors were enclosed by strong

fences, and it would certainly interfere seriously with the efficient working of the compound system if people were allowed to come in to these areas and wash debris. If Area No. 2 were allowed to be worked, the hospital and other buildings would be undermined. A rock shaft was also being sunk on Area No. 2, and reef from the shaft would be carried to the proper place by means of mechanical haulage, the plant for which would also cross the area. Upon one of the areas a railway siding was constructed, and in witness's opinion the company could not give up the areas and efficiently carry out its mining operations. If the Government terminated the lease of the ground the company held outside the mining area, No. 3 would also be required for depositing, and even then more ground would be needed. The fact was that more ground was needed every day. With regard to the tailings on the ground in dispute the shale would have to be removed before they could be got at, and that was impracticable, and would be so costly that the enterprise would not pay for the cost of carrying out the work. On many of the floors the debris belonging to De Beers was piled on the top of debris which was placed there in years gone by, and it was an absolute impossibility to separate the two.

By the Attorney-General: Area No. 3 did not happen to be required at the moment, but it was impossible to foresee what might be wanted any day.

Mr. Gardner Williams, general manager of De Beers, said he was thoroughly acquainted with the requirements of the mine, and from a careful examination of Area No. 2 he had come to the conclusion that it was absolutely necessary for mining purposes. If people were allowed to take debris from the floors it would seriously interfere with the operations of the company. When the surveys for the mechanical haulage plant were made there was no intention that the plant should go along the areas in dispute, but eventually that was found the only way in which the work could be carried out. It was true that a number of people were washing debris on Area 3, but in one sense they were employes of the company, for they had to pay 5 per cent. on what they found, and to be otherwise amenable to the company's regulations.

By the Attorney-General: It would not be sufficient for the purposes of the company if the tramway line were allowed to run along these areas. The line required to be thoroughly fenced in, otherwise large thefts would take place. It was not correct to say that the rock shaft on Area 2 was nearly finished. It had to go a great deal deeper yet, and it could scarcely be said that it would ever be finished.

By the Court: Area No. 2 could not on any

account be given up. It was absolutely necessary in order that the company should carry on its work.

Mr. Theunis Maritz, a former claimholder in the Kimberley Mine, stated that in his time claimholders dealt with their own tailings. No outsider was allowed to wash tailings without the leave of the owner. By owner he meant the owner of the claim from which the tailings were taken. Witness sold his claims to the Central Company, and continued to wash his tailings after the sale, but he made a special agreement to that effect.

By the Attorney-General: The agreement was not in writing. As a general rule the floors went with the claims. He spoke from personal experience.

For the defence, Captain Erskine Superintendent of the Breakwater Convict-station, but Inspector of Mines at Kimberley from 1881 to June, 1891, said that when he was first appointed there was practically no system with regard to the distribution of depositing floors. The floors were taken. In 1885 witness issued a notice on the subject of depositing floors in order to protect the Government with regard to the rent. He did not remember any case in which he refused to allow the transfer of floors with claims. He did not recollect a case arising out of the notice. Speaking from his experience he did not think De Beers needed Area No. 3 as they worked at present, but he should not like to take Area No. 2 away from them, because he considered that necessary.

By Mr. Solomon: From his knowledge of the mine he was certainly of opinion that it was necessary that the company should possess a compact mining area in the mine.

By the Court: His duties were to protect the safety of life and limb, but his predecessor had taken up the matter of the rents, &c., and it was almost impossible to get out of that system.

Mr. T. W. P. Osterloh, a former claimholder in the Kimberley Mine, said that in the early days it was customary for diggers to pile debris where they could, and frequently to leave it untouched afterwards. Witness proceeded to trace the history of the various floors in dispute.

By Mr. Solomon: Everyone in Kimberley knew the distinction between tailings and debris, and he was surprised to find that Cape Town people did not appear to realise the difference.

Mr. Thomas Bell, a digger of many years' experience, said that although he had been a claimholder in the Kimberley Mine he had frequently washed there on percentage. Although not a claimholder, he took possession of a floor, and no one disturbed him. That was in 1872.

By Mr. Solomon: He used Area No. 3 for washing, but that was in 1872, before the mining area was proclaimed.

Mr. Henry Lyley, Mr. Arthur Stead, Mr. James Lookhart, and Mr. John Martin Keavy gave similar testimony with regard to the custom obtaining in Kimberley in their experience, and the witness Stead stated that, in his opinion, the areas now in dispute would pay well if they were properly worked, there being a great quantity of old debris there and some virgin soil.

This concluded the evidence.

SUPREME COURT.

WEDNESDAY, FEBRUARY 10.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

DE BEERS CONSOLIDATED MINES V. THE COLONIAL GOVERNMENT.

The hearing of this case was resumed. The plaintiffs were represented by Mr. Solomon, Q.C., Mr. Schreiner, Q.C., and Mr. Webber, and the defendants by the Attorney-General, Mr. Giddy, and Mr. Searle.

Mr. Solomon, for the plaintiffs, said that the two points of first importance in the case were as to whether the Government had any right whatever to make an alteration of the Kimberley mining area without the consent of the plaintiff company, and secondly, who had the right to deal with the tailings located upon that area. He contended that nothing had been done by the Legislature which would amount to an invalidating of the Ordinance No. 21 of 1880, upon which the plaintiffs relied, and said that so long as that Ordinance remained in force the Government could not alter the mining area without the consent of the claimholders, the De Beers Consolidated Mines. As to the second question in the case, the evidence before the Court was perfectly clear on the point that ever since the mine was opened the tailings had been recognised as the property of the claimholder, and the Government could not now come in and claim ground which belonged to the plaintiff company just as much as the ground which was ordinarily worked. Mere non-user did not amount to abandonment, and the company and everyone connected with the mine had continuously regarded the tailings as their property. Counsel referred to "De Beers v. Lillie," 6, H.C.R., 55; "Robertson v. Hartopp," 43, Ch. D., 484; "Balfontein Mining Board v. Armstrong and London and South African Exploration Company," 1, C.T.L.R., 192.

The Attorney-General was heard for the Government.

The Chief Justice, without calling upon Mr Solomon, then gave judgment. His lordship said that by Ordinance No. 5 of 1874 it was enacted that it should be lawful for the Governor of the Province of Griqualand West to proclaim such areas throughout the Province as might be necessary to be public diamond-fields in accordance with the Proclamation of Sir Henry Barkly of the 27th October, 1871. Under that Ordinance a proclamation was issued on May 4, 1874, by which the areas of the mine in question, Nos. 1, 2, and 8, were fixed by meets and bounds. After that proclamation was issued doubts appeared to have arisen as to whether anything done under Ordinance No. 5 of 1874 was valid or not, inasmuch as that Ordinance had been disallowed by Her Majesty, and accordingly Ordinance 21 of 1880 was passed, in which it was enacted that the Areas Nos. 1, 2 and 8, as constituted by the proclamation of May 4, 1874, so far as the areas were situated on the Vooruitzicht Estate, should be deemed to be, and should be legally constituted, precisely as if Ordinance 5 of 1874 had not been disallowed by Her Majesty, but was in full force and effect. Now the Ordinance No. 5 of 1874 gave the power to proclaim areas. In his opinion, as soon as the Governor had issued his proclamation in consequence of the power conferred upon him by that ordinance he was *functus officio*. He had no legal power to alter those areas, especially where any rights had been acquired in consequence of the proclamation being issued, and if the Governor wished to issue any future proclamation altering the areas already fixed he could only do so by an Act of the Legislature. After the passing of Ordinance 21 of 1880, therefore, there was a legislative enactment defining the areas, and anyone interested could thereafter oppose any alteration of the areas. It had been argued, however, that another proclamation of 1880 counteracted the effects of the Ordinance 21 of 1880, but he could hardly think that the Legislature intended six days after the issue of Ordinance 21 to undo, by the proclamation of September 30 of 1880, what had been done six days before. In his opinion the latter proclamation was not intended to touch Ordinance 21 of 1880. Then there was the question as to whether the Colonial Act of 1888 altered or repealed Ordinance 21 of 1880. Now as to that Act they found that it was pretty carefully worded and drawn, and that the schedule in the Act mentioned all previous statutes which were repealed, but wholly omitted to mention Ordinance 21 of 1880. Two sections were relied on by the defendant—section 18, which did not appear to affect existing diamond diggings, and section 84. After quoting the section in full,

the Chief Justice went on to say that if the contention of the defendant's counsel were accepted, it would mean that the Act would be given a retrospective character, whereas the rights of the parties in the Kimberley Mine had been fixed by Ordinance 21 of 1880, and it would require very clear proof indeed to justify the Court now in coming to the conclusion that the Legislature intended to alter rights which had already been acquired. In his opinion the Ordinance No. 21 of 1880 still stood unrepealed, and the Government had no power to alter the mining areas if the claim-holders in the mine objected to such a proceeding. It was admitted that some alterations were made in 1886, but it appeared that that was done with the consent of the Mining Board or of the claim-holders in the mine. No such consent was obtained by the Government before issuing the Notice 618 of 1891, by reason of which this action was brought. As soon as that notice was published the plaintiffs sent in a protest, and in his opinion that protest was a valid one, and the plaintiffs were entitled to a judgment in the terms of the first prayer of the declaration. The second prayer asked for a declaration that the plaintiffs, while owning all the claims in the mine had exclusive control of the mining area, and that the defendant should be restrained from altering the area without consent of the plaintiffs. He thought that was too large a prayer and rather wide. What the Court proposed to do was to make the following order—that while the plaintiffs are the owners of the claims in the mine the defendant cannot alter the said areas without their consent. As to the third prayer, which referred to the debris and tailings, he was of opinion that all debris and tailings on floors leased to the plaintiffs belonged to them, and that the Government had no right to them. In its judgment, however, the Court would confine its declaration to the floors actually leased to the plaintiffs, and upon that part of the case the decision would be that the debris and tailings located in the areas, excepting such as were located on the floors referred to in the Government Notice of 1891, were the property of the plaintiffs, and that the plaintiffs alone had the right to search for diamonds there. As to the debris on the floors not in the occupation of the plaintiffs he thought the Government still remained the owner of the abandoned claims, and had established its right to the debris and tailings there. The judgment would be, as to the first prayer, that the Government Notice 618 of 1891 was invalid and *ultra vires*; secondly, that so long as the plaintiffs owned all the claims in the said mine the defendant could in no way alter the mining area without their consent; thirdly, that the debris and tailings located in the area in dispute, excepting

such as were referred to in the Government Notice 6180f 1891, were the property of the plaintiffs, and that the plaintiffs alone had the right to search for diamonds there. The plaintiffs having won their case, they were entitled to costs. Upon the claim in reconvention there would be absolution from the instance.

The Attorney-General intimated that the parties would endeavour to come to an arrangement with regard to the disposal of the debris adjudged by the Court to belong to the Government.

The Chief Justice assented, and said that the Court would of course confirm no arrangement of an unreasonable character.

[Plaintiffs' Attorneys, Messrs. Scanlen & Syfret; Attorneys for the Government, Messrs. Reid & Nephew.]

GOODE V. DE BEERS CONSOLIDATED MINES;
SHEPHERD V. THE SAME.

It was decided to take these cases together. Mr. Searle and Mr. Molteno appeared for the plaintiff Goode; Mr. Juta and Mr. Graham for Shepherd, and Mr. Solomon, Q.C., and Mr. Schreiner, Q.C., represented the defendant company in both cases.

The first action was instituted by Mr. Goode, a resident of Kimberley, and from the pleadings it appeared that in 1885 the plaintiff purchased the right to wash certain debris from the Mining Board which was then in existence. For the sum of £50 the Board sold to the plaintiff the right of dealing with a certain mass of debris lying between the old incline of the French Diamond-mining Company and the south-west cutting of De Beers, and plaintiff continued to work the ground for some years, until, about 1889, the defendant company became the successors of the Mining Board. Plaintiff concluded an agreement with the defendants by which he was to use certain ground for the term of one year, which ended in 1891, but plaintiff renewed the lease for another year with a servant of the company, whose act was afterwards repudiated by them. Plaintiff claimed the right to continue the washing of the debris purchased by him in 1885. Defendants in their plea contended that plaintiff had gone outside the limits of his original concession, and also that he had been washing tailings as well as debris, which he had no right to do under the concession.

Plaintiff went into the box, and stated that he had spent over £3,000 on machinery, &c., in order to work his concession. He had worked for years just as he worked when the De Beers Company gave him notice to stop, and it was not until last year that the company ever drew any distinction, so far as he was concerned, between tailings and debris. It was not correct that he had washed

tailings which belonged to the company. He had washed about 500,000 loads, and probably would require two years in order to complete washing operations. Whilst the witness was giving evidence,

The Chief Justice suggested that the parties should try and come to some arrangement of an amicable nature, and counsel for the defendants promised to confer with his clients to see if a compromise could be effected.

SUPREME COURT.

THURSDAY, FEBRUARY 11.

[Before Sir J. H. DE VILLIERS K.C.M.G., (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

DEAL V. HYAMS, TRADING AS PROWSE.

Mr. Tredgold moved for final adjudication of the defendant's estate, which was granted.

STANDARD BANK V. RUSSAU BROTHERS: G. H., A. P., AND M. W. RUSSAU.

Mr. Graham moved for final sequestration of the defendants' estates, which was granted.

THE COLLECTOR OF CUSTOMS V. DE BEERS
CONSOLIDATED MINES, LIMITED.

Machinery for "mining purposes"—Construction—Electrical plant—Customs duty—Act 13 of 1884—Act 1 of 1889.

Mr. Searle and Mr. Jones for the plaintiff; Sir Thomas Upington and Mr. Schreiner for the defendants.

This was an action instituted by the Colonial Collector of Customs for the payment of certain moneys alleged to be due in respect of Customs dues on certain goods imported through the Customs Department by the defendant company. The declaration stated that in the months of May, June, August, September, and October, 1890, the defendant company imported certain articles, which were described in the bills of entry as tubes for shaft pumps, parts of steam mining pumps, and mining machinery to the amount of £6,996, upon which the Customs dues were £798 6s. The articles, the Collector of Customs had contended,

were not machinery for mining purposes within Act 1 of 1889. The defendant in their plea admitted the formal allegation, but stated that the articles imported were machinery within the meaning of Act 1 of 1889, and in reconviction claimed £664 15s. 10d. in respect of articles upon which that amount of duty was paid under protest.

Mr. Quentrall, Inspector of Mines at Kimberley, gave evidence that he was well acquainted with the articles which formed the subject of the action. They consisted largely of piping imported for the purpose of leading water from the mines to the washing machines, and for watering the blue. Some of the pipes were used for leading water from the Vaal River, but he understood that upon those the company were willing to pay duty. The pipes were 8-inch, 4-inch, and 6-inch. The pipes used for conveying water from the Vaal River to the Kimberley Mine—which were used occasionally—were 4,452 feet in length, and there were about 3,000 feet used at the De Beers Mine, which in his opinion were in the same position as the 4,452 feet. He had also made an inspection of the other articles. Among other things was an electrical plant, including electrical gear, material for arc lamps, insulators, and electric cable and copper wire.

The Chief Justice: Do you consider this electrical plant essential to proper mining work?—Yes, my lord, on account of its safety.

Mr. Searle: Do you know anything about mining in England?—Yes. I have been connected with mining almost all my life.

Mines are worked there without electric light?—A great many of them.

The Chief Justice: But diamond-mining is a very peculiar industry?—Yes, there is very great danger from fire in diamond-mining. The tremendous loss of life some years ago was caused by fire in the mine, and special legislation has been passed to guard against it.

Is there no danger from gas?—No, not in diamond mines.

You are a mining engineer, and consider it essential for the safe working of the mine that this electric plant should be used?—I do. Proceeding, witness said that the further articles were mesh-plates, which could practically be put to no other use save that for which the company imported them; flat steel plates, which were manipulated by the company's workpeople and then used in the machinery; channel bars, and some kegs of rivets, which were of a special character, likely to be used only for boiler-making.

Mr. Gardner Williams, General Manager of De Beers, having given formal evidence as to the use the different articles would be put to, said that in his opinion, as a practical mining engineer, they were all necessary for mining purposes.

Mr. Searle, in his argument for the plaintiff, contended that by the Act of 1889 what the Legislature intended was not that everything which might have some remote connection with mining should come in duty free, but that machinery which when it passed through the Customs was machinery on the face of it, and not raw material which might afterwards be worked up into machinery, should be exempt. It was doubtless advisable that the mine should be worked by means of the electric light, but he denied that electric light was directly necessary in order to enable the diamonds to be won, and contended that the plant could not be considered as machinery.

The Chief Justice, in giving judgment, said he still adhered to the view which was expressed by the Court in the case of the "De Beers Company v. The Collector of Customs," decided in 1889, that it lay upon the importer to satisfy the Court that the articles which he claimed to import duty free were exempt from duty. That case was decided under Act 13 of 1884, but the present case had to be decided under the later Act of 1889, which was somewhat wider in its terms than the Act of 1884. That Act spoke only of mining machinery, but the Act of 1889 spoke of machinery for mining purposes. The first question to be decided was whether the piping mentioned in the declaration were component parts of machinery for mining purposes. The defendants had agreed to forego their claim in respect of the 4,000 odd feet of piping used to convey water from the Vaal River to the Kimberley Mine, but they claimed exemption as to the 3,000 feet at De Beers. In his opinion the whole of the piping, except that used at the Kimberley Mine for the conveyance of water from the Vaal River, were component parts of machinery for mining purposes. Mr. Searle had contended that only machinery necessary to take the soil out of the mine, or discharging water out of the mine, was machinery for mining purposes, but in his opinion that was altogether too limited. The words "mining purposes" meant all such purposes as were necessary in winning the diamonds from the soil, and they included such works as were necessary on the surface, as well as those beneath the surface. There was some difficulty with regard to the claim in reconviction. The defendants had paid under protest on several articles mentioned in the claim, and now they sought to recover back what they had so paid. The first item was for electrical gear in connection with the lighting of the mines and the floors. In his opinion that was necessary for mining purposes. The question was not, was it necessary to light the mine by electricity, but was it necessary to light the mine at all. Well, as to the mine itself, it was clear that light was an absolute necessity. They could not work without

it, and as soon as labour-saving machinery was used for the purpose of lighting it fell within the definition of machinery for mining purposes. Some difficulty might arise as to the plant on the surface, but there also it was used solely for mining purposes. Then he came to consider the case of other articles which could scarcely be said to be component parts of machinery. He did not think that the steel-plates and channel-bars, which could be used for other than mining purposes, were articles such as the Legislature intended to come in free of duty. As to the mesh-plates, it was clear that they could not be used for any other purpose than that for which they were used by the company, but as to the bars, the rivets, and the steel-plates, which could be used for so many purposes, he did not think it was intended that they should come in duty free. The result would be that there would be judgment for the plaintiff in convention for £20, and for the plaintiffs in reconvention (the De Beers Company) for £586 2s. 6d., but the plaintiff in convention would have to pay the costs.

[Attorneys for the Government, Messrs. Reid & Nephew; Attorneys for the defendants, Messrs. Scanlen and Syfret.]

GOODE V. DE BEERS CONSOLIDATED MINES, LIMITED; SHEPHERD V. THE SAME.

In these cases, in which Mr. Searle and Mr. Molteno appeared for Goode, Mr. Juta and Mr. Graham for Shepherd, and Mr. Solomon, Q.C., and Mr. Schreiner, Q.C., for the De Beers Company Mr. Solomon informed the Court that in accordance with the suggestion of the Chief Justice the parties had come to an arrangement, and judgment was accordingly given in terms of a consent paper put in.

REHABILITATIONS.

On motions from the bar, the Court granted the rehabilitations of Robert Francis Cantwell, Herman Ruperti, Marks Simenhoff, and Jan van Schoor Jurgan-Kotzé.

GENERAL MOTIONS.

In re THE CAPE CENTRAL RAILWAYS.

Mr. Schreiner presented a special report of the official liquidators with reference to the contract for the sale of the line, and requested a further allowance of time in which the purchaser might pay the balance due and lodge the share certificates. Counsel explained that the money was in the hands of the Court in England, and said that

unless the balance was paid within six weeks the £5,000 lodged with the Court would be forfeited.

The Court granted an order extending the time six weeks from the time the cable message was received in London announcing that the Court had acceded to the application.

In re PETITION OF WHITE, MULLER AND CO.

Mr. Schreiner moved for leave to attach certain piece of landed property, situated at the corner of Orange and Rheede-streets, Cape Town, *ad fundandam jurisdictionem*, in an action to be instituted by edictal citation for recovery of the amount of certain promissory notes due to petitioners.

The order was granted, personal service to be effected.

In re KAFFRARIAN COLONIAL BANK.

Mr. Castens moved to make absolute the rule *nisi* for transfer to the said bank, under the provisions of the Titles Registration and Derelict Lands Act, 1881, of certain lot of land marked No. 8, in the village of East London, originally granted to Peter Ehlinger, a German military settler.

The order was granted.

THE CAPE OF GOOD HOPE BANK, LIMITED v. THE REGISTRAR OF DEEDS.

Mr. Schreiner moved for an order requiring the Registrar of Deeds to accept and duly register a certain deed of transfer by which the liquidators propose to convey to the African Banking Corporation certain premises in Adderley-street. Counsel stated that the Registrar had refused to pass the deed because the premises proposed to be transferred were still registered as the property of a company which was dissolved on the 15th January, 1858, and the new company which was established on that date under the same name had never obtained legal title to the said premises.

The Registrar was of opinion that the liquidators had no title to the property, which he held was still vested in the original company.

Mr. Searle appeared for the respondent, and said that the premises were registered as belonging to the old company, which was dissolved in 1858. The company was originally formed in 1836, but in 1858 a new company was established, but there was no change of registration with regard to the premises in question. The Registrar of Deeds did not offer any factious opposition; but the case was so unusual that he deemed it his duty to give transfer only under order of Court.

Mr. Schreiner submitted that although the life of the company had lapsed, yet it had been revived by the same proprietary, and under these circumstances transfer was not necessary.

The Chief Justice pointed out that the company was actually dissolved in 1858, and a new company was established.

Mr. Schreiner asked the Court to lay down the fundamental principle in all these cases that change of proprietorship must take place before transfer should become necessary. Though the company was reconstituted, no change of trustees was made, the old trustees being reappointed.

The Chief Justice said he should require to be reassured upon this latter point.

Mr. Schreiner said he had made particular inquiries, and was informed that that was so.

Mr. Searle said although not instructed upon this point he did not doubt the word of his learned friend.

Mr. Schreiner said the point was this: If it were held that transfer should have been effected it would involve the payment of over £4,000 in transfer fees.

The Court granted the application, at the same time expressing the opinion that the Registrar of Deeds was justified in coming to the Court.

PETITION OF THE CAPE OF GOOD HOPE SAVINGS BANK.

Mr. Graham moved for authority to the Sheriff to sell, and to the Registrar of Deeds to pass, transfer of certain piece of perpetual quitrent land, situated in the division of Worcester, attached in respect of a judgment against one Stephanus Botma, notwithstanding an error to the extent of five morgen in the description of the land in the deed of transfer to the defendant. Counsel said the Registrar of Deeds opposed the application in its present form, and had suggested that he be first instructed to alter the deed of transfer passed in 1880 to the actual extent of the farm.

The Court granted an order in terms of the Registrar's suggestion.

HERPS'S TRUSTEES V. BROWN.

Mr. Schreiner moved for an order confirming the account and plan of distribution filed by the said trustees, and requiring the respondent to pay the costs occasioned by his failure to proceed with his objection lodged in respect of such account.

The Court granted the order with costs.

IN THE ESTATE OF THE LATE STEPHANUS C. DU PLESSIS.

Mr. Molteno moved for an order authorising the Registrar of Deeds to accept as valid certain transfers in respect of the farm Petzersbaken in the division of Philip's Town, and to amend the date of the deed by which the said Du Plessis held title to the land in question.

The application was granted, the rule to be published in the *Government Gazette* and in the *Colesberg Advertiser*.

HEYNEMAN V. BRAUER.

Mr. Juta moved for an order postponing the trial of the cause to such day as to the Court may seem fit, pending the arrival in this colony of a material witness for the defence. Counsel pointed out that the witness referred to would return to the Colony next month, otherwise a commission to take his evidence would have been appointed.

Sir T. Upington, Q.C., for the respondent, opposed the application, on the ground that the person referred to as a "material witness" knew really nothing about the cause. These parties were in partnership as proprietors of a skating rink; the partnership was dissolved and the cause was as to the disposal of the assets. The amount of the plaintiff's claim was only £20; it was a wretched case altogether.

Mr. Juta said his client had made several offers, but the other side refused to compromise.

The Chief Justice said the Court would hear the case, and if the witness was material to the issue, would adjourn it for his appearance. There would be no order, and the question of costs would stand over.

THE PROSECUTION OF FREDERICK A. BOWERS.

Appeal from the conviction of the appellant by the Resident Magistrate of Kenhardt on a charge of contravening the provisions of the Police Offences Act, 1882.

Mr. Juta for the appellant (defendant in the Court below), and Mr. Giddy for the respondent.

Mr. Giddy said he could not support the conviction.

The Court quashed the conviction.

[Appellant's Attorneys, Messrs. Tredgold McIntyre and Bisset.

SUPREME COURT.

MONDAY, FEBRUARY 15.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

REGINA V. PATERSON.

Mr. Giddy applied for change of the venue in this case to the next Circuit Court to be held at Uitenhage.

The Court granted the application.

IN RE UNION BANK V. BEIT.

Sir T. Upington, Q.C., Mr. Solomon, Q.C., and Mr. Schreiner, Q.C., appeared for the applicant (Mr. Beit), and Mr. Searle for the respondents.

Sir T. Upington made an application with respect to the setting down of this case for trial. Counsel read the affidavit of Mr. A. Beit, who stated that he resided in London, and arrived in the Colony in May last, since which time he had been in the interior of Africa. He arrived in Cape Town from Johannesburg on January 29, 1892, to attend the trial of this cause. The case was commenced by the issue of summons on November 18 last, when his attorneys accepted service in Cape Town, and entered appearance on November 24 last. The plaintiffs' declaration was served on deponent's attorneys on November 26 and the plea and replication were filed on December 9, notice of trial for December 19 being given. In consequence of the absence in Europe of Max Michaelis, a material witness for the defence, the case was allowed to stand over till the following term. Eventually the case was set down for February 5, but as the result of representations made by the plaintiffs with regard to the illness of Mr. Harry Gibson, the date of the trial was postponed till February 8, but thereafter plaintiffs' attorneys informed his attorneys that the case had been removed from the roll for that date. Deponent had since the failure of the bank been willing and anxious to have the matters in issue brought to trial and disposed of. The plaintiffs not having taken steps against deponent by May last, he caused a letter to be addressed to them requesting that the matter might be brought to trial. The said Michaelis, who was at Naples, was telegraphed for, and arrived in Cape Town on January 18, 1892, to attend the trial of the case. Deponent made arrangements to leave for England on December 30 last, and when the case

was set down for February 5 he again arranged to leave by steamer on February 10. He could not without serious inconvenience and possible loss, delay his departure further, and prayed the Court to make an order setting the case down for trial during the present term, or else to direct that the evidence of Max Michaelis should be taken on commission.

Mr. Searle said that the plaintiffs were really debarred from putting their whole case before the Court by reason of the serious illness of Mr. John Ross, who was in the hospital suffering from a severe attack of influenza. At present he was unable to give evidence on commission or otherwise, but it was felt that as he was in Cape Town it would be desirable that his evidence should be taken in the ordinary way. It was expected that within a week or ten days Mr. Ross would be convalescent and able to give evidence before the Court. Counsel stated that his clients were prepared either to take Mr. Beit's evidence on Wednesday and allow him to leave by the mail, or to take the whole case on Friday, with the understanding, however, that if Mr. Ross was then unable to give evidence his testimony should be taken after that of the other witnesses. There would be a question of onus, but as a fact he thought it would be admitted that the onus was on the defendant, the liquidators being in possession of certain liquid documents purporting, at all events, to bear the signature of Mr. Beit. The urgency, he thought, was principally with regard to Mr. Beit, Mr. Michaelis, as he understood, not desiring to leave for England on Wednesday. Counsel added that a series of misfortunes had happened to the plaintiffs and prevented the case being tried earlier. Mr. Juta, he said, had gone to Kimberley, and he (Mr. Searle) felt that he would not be able to do justice to the case by Tuesday, Mr. Juta having had all the documents before him as leading counsel.

The Chief Justice: But could we finish the evidence before the mail leaves?

Mr. Searle: We might finish Mr. Beit's, but I don't think we should finish Mr. Michaelis's.

The Chief Justice: Could not Mr. Beit delay his departure for another week?

Sir T. Upington said that Mr. Beit would do that on condition that no further delay was asked.

Mr. Searle said there would be no further delay if the case were allowed to be set down for Friday, it being understood that Mr. Ross should be allowed to give his evidence later, if he were not then convalescent.

The Court set down the case for Thursday, and intimated that no further postponement would be permitted beyond that date.

THE NEW GORDON DIAMOND-MINING COMPANY
AND ANOTHER V. DU TOIT'S PAN MINING
BOARD.

Mandamus—Mining Board—Water—Statutory liability—Interruption of mining operations—Act 19 of 1883—Appeal.

Mr. Searle and Mr. Molteno appeared for the appellants, and Sir T. Upington, Q.C., Mr. Solomon, Q.C., and Mr. Schreiner, Q.C., for the respondents.

This was an appeal from a judgment of the High Court of Griqualand West refusing an application made by the appellants for a *mandamus* to compel the Du Toit's Pan Mining Board to take steps to remove, or cause to be removed, from the Du Toit's Pan mine the accumulations of water already existing in that mine, and for keeping the said mine free of water in the future.

In refusing the application, the learned Judge-President delivered the following judgment:

This is an application for an order in the nature of a *mandamus*, or of what would be described in the Chancery Division as a mandatory injunction, directing the respondent Board to take such steps as may be necessary for the removal of the water which is alleged to have collected in the Du Toit's Pan mine in such a manner and to such an extent as to interfere with the mining operations of the applicants. It is admitted that there is no exact precedent for such an order, and that the respondent Board has never yet dealt with the water in the Du Toit's Pan mine, but it is contended that they are empowered to do so, that in existing circumstances it is their duty to do so, and that this is a duty which the Court, on the facts before it, ought to enforce on motion. It seems clear that, under the Act of 1883, mining boards are entitled to incur expenditure for the removal of reef and water from the mines under their control. By section 51 they are empowered to fix tariffs for that purpose, and raise funds to pay contractors under such tariffs by means of rates. They have also certain borrowing powers under section 61, to raise funds for the due and efficient working of the mine, which powers, however, cannot be exercised without the consent of claimholders representing three-fifths of the assessed value of the mine, while under section 51, rates, when levied, have to be passed as bye-laws and approved by the Governor. The Mining Board, then, having these powers of raising and expending money, I am inclined to agree with the argument of the Crown Prosecutor that in certain circumstances it may become their duty to exercise them, and if they fail to perform that duty, they may be held liable in damages, as was held in this Court by Mr. Justice Buchanan in

1882, in the case of the Central Diamond-mining Company v. The Kimberley Mining Board. The question, however, remains whether they can be compelled by the Court on a motion like the present to exercise these powers, and whether the Court can hold it to be proved on the affidavits before it that the respondents have incurred the obligation which the applicants seek to enforce. In a case like this I am of opinion that the applicants are bound to satisfy the Court that the conditions exist which would entitle them to an ordinary interdict; that is to say, that they have a clear right, and that, unless they obtain the relief sought, they will be remediless in the premises. I do not think that they have met these requirements. I do not think that the Court, on the evidence before it, is in a position to say whether it is the duty of the Mining Board, or of some third party, such as the De Beers Consolidated Mines, to deal with this water. It may be that, on the principle upon which claimholders have been held liable for damage sustained by their neighbours owing to their leaving their claims in a high and dangerous condition, or on the principles with regard to damage caused by overflow of water laid down in this Court in the case of the "De Beers Mining Company v. Victoria Diamond-mining Company," the case is one in which the De Beers Company are solely liable, and not the general body of claimholders represented by the Mining Board; or it may be that the case is one in which the Board is liable on the principle of the case of the Kimberley Mining Board above referred to; or, again, it may be that this water has accumulated in such circumstances as to render it the duty of the applicants, either in whole or in part, to deal with it themselves. For these reasons, I am of opinion that the applicants have failed to show that their right is so clear, and the damage otherwise so irreparable, as to justify the Court in making the order for which they apply. The application must therefore be refused with costs.

From this judgment the applicants now appealed.

Mr. Searle, in support of the appeal, contended that it would be difficult to imagine a stronger case for the intervention of the Mining Board. The Mining Board represented the claimholders, and in a matter of this kind it was bound to take the initiative. In the present condition of the mine no company could work.

The Chief Justice: Is any duty imposed by statute on the Mining Board to remove this water?

Mr. Searle: Not in express terms.

The Chief Justice asked how the Court, then, was to make the Board do this work.

Mr. Searle said that the Board simply represented claimholders, and was obliged to act in the

general interests of all those who worked in the mine. If it were clear that a case had arisen calling for the intervention of the Board, he contended that the Court could order the Board to step in, especially where, as in the present case, the duty was laid upon the Board by the Act, impliedly at all events. Counsel referred to section 51, Act 19 of 1883, and said that under that section the Mining Board was clearly the body to remove the water by means of levying a rate.

Mr. Justice Smith said he had always understood that what the Board did was to order claim-holders to remove reef or water, not that it did the work itself.

Mr. Justice Buchanan said that the Board worked through bye-laws. Was there a bye-law bearing out counsel's argument?

Mr. Searle said no, but that he contended the Court could compel the Board to say what it was prepared to do in the matter. Up to the present, the Board had made no offer as to its intentions in the matter at all.

The Chief Justice said that the section which was most favourable to the appellants was section 58 of the Act of 1883, which enacted that the Board should do all that was necessary for the working of the mine. The question was as to whether it was necessary for the working of the mine that the water should be removed.

Mr. Searle said that the answer to that was distinctly in the affirmative, two of these companies having already been flooded out in consequence of the flow of water.

The Chief Justice: Have you any case in which the Court has made an order compelling a public body to do anything like this?

Mr. Searle: A mandamus addressed to a Government officer is the nearest analogous case I can think of.

The Chief Justice: In such a case the Court merely ordered an inferior judicial officer to do a certain duty, but that was not the same as ordering a public body to do something, such as was asked in the present case. The matter was of a most important and serious nature, and I would like it fully discussed, for if the Court did what the appellants wished, I see no reason why it should not also interfere with all the divisional councils and municipalities in the country, and order them to do work which ratepayers wished them to do. It was a very different thing to say to a body it should not do a thing from ordering it to do something.

Counsel referred to "Kerr and Joyce on Injunctions," and to "The Victoria Diamond-mining Company v. De Beers," 1, Appeal Cases, 800; "O'Keeffe v. Scott," 2, H.C.R., 829; and "The Bultfontein Mining Board v. Armstrong and the London and South African Exploration Company," 1, C.T.L.R., 192,

Mr. Justice Smith: Has the Inspector of Mines been applied to?

Mr. Searle said that officer was one of the respondents, but his duties were confined to the protection of life and limb.

Sir T. Upington said the two points to be decided were, first of all, was there any statutory liability upon the Mining Board to do the duty sought to be imposed upon them, and, if that were so, was it such a statutory duty as the Court would enforce against the body in question? If the Mining Board was liable to do everything that was necessary for the working of the mine, it might with perfect seriousness be contended that it was its duty to take the soil out of the mine. It was never intended, he submitted, that the Mining Board itself should haul up reef and water; all it had to do was to see that the claimholders did their work properly. The effect of a decision by that Court in favour of the appellants would be to turn the courts of the country into mining boards. [The Chief Justice: And probably divisional councils and municipalities.] He had made extensive search, but could find no single case in which the Court had made an order on a public body such as was asked for here. The greatest danger, he contended, would result if the Court gave a wider meaning to an Act than the Legislature itself had intended. The Act of 1883 clearly omitted to lay upon the Mining Board the great liability now sought to be cast upon it, and under those circumstances he felt sure the Court would not interfere.

The Chief Justice, in giving judgment, said that where a statute described a specific act to be performed by a public body, and the public body did not perform that specific act, a very important question might arise whether the Court would not compel the public body to perform that specific act, if it were necessary for the purposes of public justice, but that question did not, in his opinion arise in the present case. The only words in the Act of 1883 which could be said to impose the duty of removing the water from the mine upon the respondents were those words which applied to the temporary Board, and said that it should have all the powers and exercise all the duties of a Board, and do all the things necessary for the working of the mine until such time as the Government might appoint another Mining Board, or another were elected. Now, clearly the duties there mentioned were duties which would involve the exercise of some judgment and discretion. The Mining Board had to decide whether it was necessary for the working of the mine; it had to consider the question of rates and funds, and how it was necessary to borrow money, and wherever there was some discretion vested in a public body he did not think that any court ought to interfere with the exercise of its

discretion by the public body. There was no clear and specific duty imposed with regard to the removal of water, and in the absence of such clear and specific duty he did not think the Court could interfere in the mode in which the Mining Board was performing its duty. If damage occurred by reason of the neglect of the Board to do its duty, there was the ordinary remedy, but it would be throwing upon the Court duties and responsibilities which could never have been intended by the Legislature if they were to inquire, in the cases of all public bodies, whether they were performing their duties in accordance with Act of Parliament—duties which involved the exercise of judgment and discretion. That being the view he took, he considered that that was not a case to be dealt with in a summary way by a mandamus, and the appeal must be dismissed with costs.

Their lordships concurred.

[Appellants' Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondents' Attorneys, Messrs. Van Zyl & Buissinne.]

SUPREME COURT.

TUESDAY, FEBRUARY 16.

[Before Mr. Justice SMITH and Mr. Justice BUCHANAN.]

BOWKER V. BOWKER'S EXECUTOR.

Will—Attestation—Ordinance 15 of 1845, Section 3—Non-compliance with terms of section—Special case.

Mr. Schreiner, Q.C., appeared for the plaintiffs, and Mr. Castens for the defendant.

This was a special case stated between James F. Bowker and Septimus B. Bowker, plaintiffs, and Robert Mitford Bowker (in his capacity as executor dative of the estate of the late Sarah Elizabeth Bowker), defendant. The facts are as follows: Robert Mitford Bowker and Sarah Elizabeth Bowker were lawfully married with community of goods, their marriage being terminated by the death of the said Sarah Elizabeth Bowker on the 25th August, 1875. Before her death the said Sarah E. Bowker signed a document, which purported to be a joint will of herself and the said Robert M. Bowker, which document purported to be her last will and testament, and as such was filed in the Master's Office. Neither of the witnesses purporting to be witnesses to the signature of the said Sarah E. Bowker to the said

document were present at the time at which she signed it, nor did she ever acknowledge her signature in their presence, or in the presence of either of them. After her death the defendant was appointed executor dative of her estate, and as such executor represented the said estate in this suit. The plaintiffs are two children born of the marriage aforesaid, and as such are heirs *ab intestato* of the said Sarah E. Bowker. The plaintiffs contended that by reason of the premises the said document was not the lawful last will and testament of the said Sarah E. Bowker, but contended that she died intestate in consequence of the lack of the formal attestation of the said document by law required for its validity as her last will and testament. The defendant submitted himself to the judgment of the Court; wherefore the parties prayed for the judgment of the Court in respect of the plaintiffs' contention, and prayed for costs out of the estate of the said Sarah E. Bowker.

Mr. Castens said that in face of the facts disclosed in the special case he had no argument to raise, and submitted to the judgment of the Court.

The Court granted an order declaring the document purporting to be a will to be null and void.

[Plaintiffs' Attorneys, P. M. Brink; Defendant's Attorney, R. C. Nelson.]

SUPREME COURT.

WEDNESDAY, FEBRUARY 17.

[Before Mr. Justice SMITH and Mr. Justice BUCHANAN.]

WIDDOWSON V. WIDDOWSON.

Divorce—Maintenance—Arrears—Deed of separation—Implied condition—Chastity—Claim in reconvention

Where a husband and wife had entered into a deed of separation, and after the execution of the deed the husband discovered that his wife had committed adultery before the deed had been executed, in an action against him for arrears of maintenance in which he claimed in reconvention a decree of divorce, the Court granted the decree and declared the deed void.

Mr. Watermeyer for plaintiff; Mr. Schreiner, Q.C., and Mr. Molteno for defendant.

This was an action brought by the plaintiff against her husband for the sum of £81, being arrears of maintenance for nine months, due to her under a deed of separation entered into between herself and her husband. The declaration set forth the marriage of the parties, and that on November 14, 1889, a deed of separation was entered into between them. By the said deed it was agreed that the defendant should pay to the plaintiff, so long as she observed the stipulations to the agreement, the sum of £9 per month. The plaintiff, according to the declaration, had observed the terms of the agreement, but the defendant had not paid the monthly instalments.

The plea admitted the marriage and the agreement, but stated that the plaintiff had not observed the latter, but had molested, disturbed and interfered with the defendant. The defendant specially pleaded that it was an implied condition of the agreement that the plaintiff had not committed adultery in breach of her duty to the defendant her husband, but that in the month of November, 1888, and at Caledon, the plaintiff committed adultery with one William James Walsh, and that by reason of the premises the agreement had become null and void, and that the plaintiff was not entitled to require from the defendant fulfilment thereof.

The defendant claimed in reconvention:

(a) A declaration that the agreement entered into on the 14th November, 1889, was null and void.

(b) A decree of divorce dissolving the marriage on the grounds of the plaintiff's adultery.

(c) An order confirming him in the custody of the children, the issue of the marriage.

(d) Costs of suit.

The defendant, John Thos. Widdowson, a commercial traveller in the employ of Messrs. Fletcher & Co., stated that he was married in 1880 at Mowbray, and afterwards lived at Riversdale, Mowbray, Cape Town, and Caledon. During the time of the married life of witness and his wife two children were born, of whom he had the custody. His married life was not happy, and in 1889 circumstances arose which made it impossible to live with his wife, and a deed of separation was agreed upon. In 1888 witness and his wife lived at Caledon, where they knew a man named W. J. Walsh. He (witness) was often away from home, but off and on lived at Caledon about twelve months. During the latter part of his stay he lived at Mrs. Langschmidt's house, where Walsh frequently visited. Up to the time that the deed of separation was drawn up he had no idea that his wife had misconducted herself with Walsh. He did not hear of it till December last, when the present suit had been commenced. Under the deed he agreed to pay £9 a month, and

paid regularly for about seven months, up to February, 1891. It was a condition of the agreement that his wife should neither write to nor see him, but during the first month she sought to see him at his boarding-house. She asked for additional money. She came to the room where witness was sitting, and when he refused her more money she sent him a number of letters applying for money, which he refused to give. His circumstances had altered recently, his income having fallen off considerably. When he made the agreement of separation his income was £300 yearly, but now he had no fixed income.

By Mr. Watermeyer: His income during the past year probably averaged £45 a month, but from that had to be deducted large personal expenses. Walsh was a shopkeeper at Caledon, and witness introduced him to his wife. He was in Caledon once after 1888, probably during the early part of 1889. His wife called on him within a month after the deed of separation was drawn up. He had not kept the letters his wife sent him after the signing of the agreement.

By Mr. Schreiner: He heard of the alleged adultery in a purely accidental way; Dr. Ford, of Worcester, being his informant.

Letty Fourie, a domestic servant at the Kimberley Hotel in Roeland-street, said she was formerly employed at Caledon, at Mrs. Langschmidt's boarding-house. She knew plaintiff and defendant, and also Walsh, who frequently visited Mrs. Widdowson when her husband was away. She saw Walsh in Mrs. Widdowson's bedroom one morning early. She took in the coffee, and saw Walsh in the bed with the plaintiff. Witness informed Mrs. Langschmidt, who went to the door and saw Walsh and Mrs. Widdowson together.

By Mr. Watermeyer: Mrs. Widdowson's children did not sleep in the same room with her. Mrs. Widdowson did not stop witness from entering the room, but said that Walsh was "tight," and that she had to give him her room. Widdowson came to the hotel later, but she did not tell him of what had occurred.

Mrs. Julia Cecillia Langschmidt deposed that the witness Fourie told her, on the morning in question, of what she had seen, and witness went to the door of Mrs. Widdowson's room. She heard voices in the room, but could not say that Walsh was in the room, but Widdowson was not at the time in the house.

By Mr. Watermeyer: She did not tell the defendant of what she had seen. She did not care to do so.

Counsel then called

William Jas. Walsh, who said he was a general dealer, living at Caledon. He knew the Widdowsons well.

Mr. Schreiner; Mrs. Widdowson, in her plea,

denies that she committed adultery with you. Is that true?

Witness: Am I bound to answer the question, my lord?

Mr. Watermeyer: I submit that the witness is not bound to reply.

Mr. Justice Smith: Of course, you know that adultery is a crime under the old Dutch law, and I think that when a man commits a wrong of this sort and then goes into the box, he is generally regarded as a contemptible character when he gives evidence against the woman he has seduced.

Witness: Can I consult with my attorney?

Mr. Justice Buchanan: You need not answer the question.

Mr. Schreiner: I did not intend calling Mr. Walsh unless it was necessary in the interests of justice.

Witness: If the question could be left unanswered—

Mr. Justice Smith: That will do. Stand down.

Mr. Watermeyer called

Mrs. M. J. Widdowson, the plaintiff, who said she was married in 1880. In November, 1888, a deed of separation was drawn up, under which she was to receive £9 a month. She had received no instalment since April, 1891. She did call one Sunday morning at her husband's house, but it was in order to see the children, whom she was allowed to see under the agreement, and she did not know that her husband was in town. She wrote one letter to him asking him for her children, but she had never asked for money. She positively denied the alleged adultery, and said that the evidence of the witness Fourie was false and untrue.

By Mr. Schreiner: Walsh had been a good friend to herself and her husband. He used occasionally to call on witness, but she did not go driving with him, and he was never in her room.

Mr. Justice Smith, in giving judgment, said there was no doubt that under the deed of separation the defendant was bound to pay £9 a month to the plaintiff so long as the deed was not infringed. When the deed was entered into the defendant was unaware that the plaintiff had committed a matrimonial offence, and he now sought, in an action to recover the arrears of the allowance, to set aside the agreement on the ground that the plaintiff had at the time the agreement was entered into committed adultery. There was no doubt that the statement of Letty Fourie did on the face of it appear strange. That this married woman, when the servant came in with the coffee, should allow the girl to see her in bed with Walsh was somewhat remarkable. They had the plaintiff's oath that no such thing had occurred. On the whole, however, the Court had

no doubt that the adultery had been proved, and therefore the deed was declared void. The defendant, he understood, had been liberal enough to offer to give the plaintiff the sum of £20, but that it was to be understood was a gift and formed no part of the agreement. Judgment on the claim in convention would be for the defendant and in reconvention for the plaintiff (the husband). The Court would pronounce a decree of divorce setting aside the marriage. There would be no order as to costs.

[Plaintiff's Attorney, Gas Trollip; Defendant's Attorney, C. C. Silberbauer.]

SUPREME COURT.

THURSDAY, FEBRUARY 18.

[Before Mr. Justice SMITH and Mr. Justice BUCHANAN]

In re UNION BANK V. BEIT.

In regard to this case—in which Mr. Searle and Mr. T. L. Graham appeared for the plaintiffs, and Sir T. Upington, Q.C., Mr. Richard Solomon, Q.C., and Mr. Schreiner, Q.C., for the defendant—Mr. Justice Smith said that before proceeding with the ordinary business of the day he regretted to state that the Chief Justice was not well enough to come to town that day, in consequence of which the case would not be taken. The Chief Justice said that he might be able to come in on Friday, but he (Mr. Justice Smith) thought that as that was uncertain, it would be as well for counsel to consider what course to suggest to the Court. It seemed to him there were three methods open. If Mr. Beit intended returning to the Colony, it might be well to postpone the whole case for a time. If he were not returning, then, in view of what had been promised in court, his evidence ought to be taken before next Wednesday. It would not be right to detain him longer. The other course would be to take all the evidence, and inasmuch as very important legal questions might arise, the legal points should be discussed when the Chief Justice was able to be in his place.

Sir Thomas Upington said that the last course his lordship had named would be the proper one to pursue. Let them proceed with the taking of the evidence, and when the legal points were discussed they would have the benefit of the presence of the Chief Justice.

Mr. Justice Smith said that was the opinion of himself and his brother Buchanan.

Mr. Searle said he would prefer that the whole case should be heard before the full Bench—both evidence and argument if possible. If that were impossible they would have to manage otherwise. It would perhaps be well to take Mr. Beit's evidence if the Chief Justice were not able to come in before next Wednesday, and then hear the rest of the evidence in the ordinary course.

Mr. Justice Buchanan: And Mr. Michaelis?

Mr. Searle did not think there was the same urgency about Mr. Michaelis.

Mr. Justice Smith said the Court did not intend to decide that day. On Friday the Court would be glad to hear what course counsel in the case were desirous to take.

REGINA V. VAN DER VENN.

Police offences—Act 27 of 1882, Section 9—
Contravention—Conviction—Special J.P.
—Reduction of sentence.

Mr. Justice Smith said that this case had come before him in which a special J.P. at Prince Albert had sentenced a man to pay a fine of £2 or a month's imprisonment with hard labour for contravening section 9 of Act 27 of 1882 by being drunk in a public place. The extreme sentence provided for a first conviction was £2 or fourteen days' imprisonment, and the sentence would be reduced accordingly.

PROVISIONAL ROLL.

PAARL FIRE ASSURANCE CO. V. MYBURGH.

Mr. Searle moved for provisional sentence on a mortgage bond for £787, reduced to £397.

The order was granted, and the property declared executable.

TAYLOR AND SYMONDS V. SCHUNKE.

Mr. Searle moved for provisional sentence upon a promissory note for £1,550, passed to the applicant.

The order was granted.

KOTZE V. KOTZE.

Mr. Castens for the plaintiff; Mr. McLachlan for the defendant.

This was an action for divorce, instituted by the wife, on the ground of the adultery of the husband. The declaration stated that the parties were married at Kalk Bay in June, 1885, and that there were two children of the marriage. About

January, 1891, the declaration alleged, the husband committed adultery with one Magdalena M. J. van Ess, and during the same year with Margaret van Ess, the daughter of Magdalena van Ess, wherefore plaintiff prayed for a decree of divorce and the custody of the children.

Plaintiff, Mrs. Catherine Kotzé, said that after the marriage she and her husband lived at Retreat. Afterwards her husband went to Kimberley and Johannesburg, and was away eighteen months. She then lived with him four months, but left him because he beat her. She went to her parents' house, but he came a fortnight later, and she returned with him. She stayed with him another fortnight, and then left him because of his ill-treatment. She had not lived with him since, nor had he contributed to the support either of herself or her children.

By Mr. McLachlan: When her husband went to Retreat he rented a farm, but did not do much work.

Emile Ferdinand Erickson, a resident at Gordon's Bay, deposed that he knew the defendant, who stayed at his house some time last year. He came with a woman. It was not the plaintiff (Mrs. Kotzé) who came with Kotzé on that occasion. He had never seen Mrs. Kotzé before that morning. Defendant and the woman engaged a room and slept there that night. The following morning Kotzé told him that he had slept on the floor and the woman in the bed.

By Mr. McLachlan: He did not think it was a custom among farming people for a man and a woman not married to sleep in the same room, the man on the floor and the woman in the bed.

Mrs. Magdalena Joubert, living at Sir Lowry's Pass, said she knew defendant. She lived on the same farm as Kotzé for three months. On one occasion he brought a baby to her and asked her to suckle it, saying it was his, and that the mother was Miss Van Ess.

By Mr. McLachlan: She was positive that Kotzé said he was the father of the child, which was about a couple of weeks old. Both Mrs. and Miss Van Ess lived on the same farm as defendant.

Gideon Joubert, husband of the last witness, corroborated what his wife had said, and said he remembered Kotzé saying the child was his.

Mrs. Amelia Bout gave evidence that the child was afterwards brought to her, and that Kotzé and Miss Van Ess came and saw the child, and treated it as their own.

The Court granted a decree of divorce, on the ground of adultery with Miss Van Ess, and gave the wife the custody of the children. Costs and witnesses' expenses for the plaintiff.

[Plaintiff's Attorney, Gus Trollop; Defendant's Attorney, H. P. du Preez.]

GEDULD V. GEDULD.

Mr. Tredgold for the plaintiff; defendant in default.

This was an action for divorce instituted by Mrs. Magdalena Geduld, the wife of a coloured labourer, by reason of the adultery of the husband. The parties were married in Cape Town in 1888, and had one child. Plaintiff gave evidence that her husband deserted her, and that she afterwards found him living in Cape Town with another woman, by whom he had had a child. Abdol, a Malay, gave evidence that defendant and a woman, not the plaintiff, were living at his house as man and wife.

The Court granted a decree of divorce, the plaintiff to have the custody of the child.

[Plaintiff's Attorney, D. Tennant, jr.]

REHABILITATION.

On motion from the bar, the Court granted the rehabilitation of Pieter Daniel Muller.

TREMEEER V. TREMEER.

Mr. Sheil moved for an order removing the trial of the suit for restitution of conjugal rights, instituted by plaintiff against her husband, to the Circuit Court to be held at Fort Beaufort on the 18th March next.

The order was granted.

GENERAL MOTIONS.

LA COMBEE V. HUTCHINS.

Pauper—Application for leave to sue *in forma pauperis*—125th rule of Court—
"Wearing apparel"—Counsel's certificate.

Mr. Moltene moved to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action for damages for breach of contract, and for an order expunging certain five paragraphs from the opposing affidavits as irrelevant to the application. Counsel read the affidavit of the applicant, which was to the effect that she was engaged in London by Mrs. Hutchins as a lady's maid. The agreement was that deponent's duties were to be those of a lady's maid only, whereas when she arrived at Kaysna she found that she was expected to do the work of a general servant, which was beyond her strength.

Mr. Searle appeared for the respondent, and read an affidavit to the effect that applicant was engaged as a general useful maid and not as a lady's maid.

Applicant performed her duties well for a couple of months, but afterwards became idle and impertinent and refused to do her work. On one occasion she refused to call Mrs. Hutchins early during the summer months, saying that although she was in this heathen country she would observe English hours. Deponent further alleged that applicant had left his employment voluntarily—that she had an extensive wardrobe, that she wore silk underclothing—that she was possessed of considerable means, as was proved by the fact of her asking him to make certain investments for her, that after she had left his house she stayed at the best hotel in the town, that she had travelled down to Cape Town first-class by steamer, and generally that she was in a position to bring her action in the ordinary course. He was informed that she held a good situation in Cape Town, and was earning high wages.

Mr. Justice Buchanan: The respondent states that the applicant gave notice to leave. What do you say to that, Mr. Moltene?

Mr. Moltene said that the applicant did not specifically deny that statement, but gave an account of what had really occurred, which included no such circumstance as the respondent represented to have occurred.

Mr. Justice Smith: Is it likely that a man in the position of Mr. Hutchins would engage this woman purely as a lady's maid?

Mr. Moltene observed that the marriage was one in high life, and there were sometimes curious features connected with such marriages.

Mr. Justice Buchanan: Does the applicant deny that she gave notice? That is the point.

Mr. Moltene: As Mr. Hutchins paid no attention to the applicant's remonstrances she left his house to seek redress. Counsel referred to the 125th Rule of Court, and remarked that he had certified after having carefully looked into the case, and he submitted that counsel's certificate in such cases was final.

Mr. Justice Buchanan referred to the case of "Ormond v. Jordan" (4, E.D.C. 260).

Mr. Searle contended that the applicant was not in the position of a pauper, and to allow her to sue as such would be an abuse of the process of the Court. Counsel referred to "Shakofsoo v. Van Noorden" (1, C.T.L.R., 121).

Mr. Justice Smith, in giving judgment, said that in an application of this sort the Court had to be satisfied that the petitioner was not worth £10. It was quite true that the rule excepted wearing apparel, but when it did so he thought it meant such wearing apparel as was suitable to a person in the petitioner's position. Now this young lady had been a lady's maid, and was a competent dress-maker. She had earned considerable sums of

money; she had saved £18 5s., and had that sum, so far as he could make out, when she left her place on account of her grievance. At one time she appeared to have thought of investing the money, but after she left she said it had been sent to her father for his support. She stayed at the best hotel at Kynana, and took a first-class passage to Cape Town, and now she came into court and asked to be allowed to sue as a pauper. No doubt it was a very good, and, he thought, a very humane provision of the law, that a poor person should be allowed to assert his rights, and he thought that counsel's certificate was *prima facie* evidence that the applicant had a good claim. As far as he was then advised, however, he did not think that that certificate was final, and although it was very desirable that a poor person should be allowed to prosecute his claim, defendants had also to be considered. He did not consider that the case of the applicant came within the rule of Court, and for that reason the application must be refused.

Mr. Justice Buchanan concurred, and said that a reference to the case of *Ormond v. Jordan* showed that the opinions of eminent judges and barristers went to show that a rule *nisi* was only granted on the evidence before certifying counsel, and that the very rule of Court under which these pauper applications were made allowed the defendant to show cause why the rule *nisi* should not be made absolute.

IN RE THE ESTATE OF JOSEPH MCCABE.

Mr. Sheil moved for authority to the curators to sell by public auction certain landed property, situated in Queen's Town, for the purpose of satisfying mortgage claims thereon, and discharging other liabilities due by the said estate.

The matter was ordered to stand over for the production of the order appointing the curators.

IN THE INSOLVENT ESTATE OF J. P. SWEMMER.

Mr. Tredgold moved for an order for the election of a new trustee to the said estate, in place of James R. Hudson, deceased.

The order was granted.

IN THE INSOLVENT ESTATE OF J. L. GERIKE.

Mr. Tredgold moved for an order for the election of a new trustee in the said estate in place of Moritz Pulvermacher, deceased.

The order was granted.

IN THE ESTATE OF THE LATE WILHELM VON PENTZ.

Will—Heir and executor testamentary resident out of the Colony—Refusal of Master

to grant letters of administration until security had been given—Ordinance No. 104, Sections 37 and 38—Act 14 of 1864—Act 8 of 1888—Practice.

Mr. Searle moved for an order directing the Master of the Supreme Court to issue letters of administration to Arnold Ritter, the sole heir and executor testamentary under the will of the deceased. The Master, counsel explained, had not felt justified in granting letters of administration to Ritter without due security, on the ground that he was not resident in the Colony, although Ritter was the sole beneficiary under the will, and the executor in addition. A year after the will was made Von Pentz was declared insane, and on that account also the Master was of opinion that the Court should be approached in the matter, seeing that the man was practically a ward of Court at the time of his decease.

Mr. Schreiner, Q.C., who appeared for the Master, stated that the brother and sister of the deceased intended to take steps to set the will aside on the ground of the deceased's insanity.

Mr. Searle said that might be so, but the brother and sister were not opposing the present application.

Mr. Justice Buchanan: The best course seems to be to decide on the objection of the Master, that as the executor is out of the Colony security should be given, and then leave the Master to take his own course with regard to the opposition to the will.

Mr. Searle said that was so, and remarked that it was difficult to see why in this case the Master should require security from the executor seeing that all he had to do was to award the property to himself.

Mr. Schreiner said the Master only desired a decision with regard to the question of security. The point as to the sanity of the testator is a matter for the consideration of his relatives. He contended that the Master had discretionary power in requiring security in peculiar cases like the present one. Counsel referred to Ordinance No. 104, sections 37 and 38, to Act 14 of 1864, to Act 8 of 1888, and to "Henning's Executor v. The Master" (8, Juta, 235.)

Mr. Searle, in reply, referred to the section 21, and to "Grobbelaar's Trustee v. Grobbelaar's Executors" (Buch. 79, p. 207.)

Mr. Justice Smith, in giving judgment, said that these two men had worked together, Pentz was residing in the Colony and Ritter outside of it. They each made a will leaving each other the whole of their property. Pentz made a will, and some time afterwards was declared insane. The Court would not then decide whether or not the will was valid. There were strong affidavits to

show that at the time he made the will he was of perfectly sound mind, but that question did not arise in the present application. Ritter had applied for letters of administration, and the question was, whether he was entitled to obtain them without providing security. The Master had stated that it had been a custom of the office, where an executor testamentary lived out of the Colony, to require security, and that might be, for reasons ably pointed out by Mr. Schreiner, a very useful practice. He did not think the point had been raised before, and the Court had now to decide whether the Master could legally, and in accordance with the provisions of the Ordinance, require this security. That an executor testamentary need not reside in the Colony seemed clear from the case of Grobbelar, and he saw no reason why a man might not appoint anyone he liked to be his executor, whether he lived in the Colony or not. There appeared to have been no intention that an ordinary executor testamentary in the Colony should give security, and that being so, he failed to see that the Master, however useful the practice had been, could legally demand security. In his opinion an order should be granted calling upon the Master to grant letters of administration. Costs to come out of the estate.

Mr. Justice Buchanan concurred, and said that unless a man was absolutely disqualified, the Master seemed bound to grant letters of administration.

IN THE ESTATE OF THE LATE G. P. MOODIE.

Mr. Searle moved for an order requiring the Master of the Supreme Court to issue letters of administration to two of the executors of the said estate residing out of the Colony, without security being furnished by them in respect of the same.

Mr. Schreiner appeared for the Master.

An order was granted similar to that in the case of Pentz.

IN THE MATTER OF THE MINORS VAN GRAAN.

Mr. Jones moved for leave to the executrix testamentary to join with the major heirs in selling certain landed property situate at Roode Hoogte, Robertson, and in case the purchase price be paid in cash, to invest the minors' shares on first mortgage.

The order was granted, the Master to approve of the security.

In re THE STEYNSBURG STEAM MILL COMPANY.

Mr. Watermeyer presented the report of the official liquidator, reporting the winding up of the affairs of the company.

The report was received, one notification of the presentation of the report to be made in the *Government Gazette*.

PETITION OF HENDRINA J. W. VOGEL.

Mr. Searle moved for an order directing the Sheriff to transfer to petitioner a half-share of certain farm Montzie, in the district of Maclear, the said property having been awarded to her in terms of a judgment of the Aliwal North Circuit Court for a division of the estate of petitioner and her husband.

An order was granted calling upon the respondent, who is in Mashonaland, to show cause, by April 12 next, why the Sheriff should not be authorised to pass transfer by reason of respondent's refusal to do so.

IN THE MATTER OF THE MINOR WITHYCOMBE.

Mr. Molteno moved for leave to the father of the minor to sell certain half-share of a piece of ground adjoining the military lines, near Cape Town, and registered in her name, the purchase price thereof to be paid into the Guardians' Fund.

The order was granted.

SILBERBAUER V. DAY.

Judgment — Attachment — Moneys — Magistrate's Court writ.

Quære—Whether money is executable under a Magistrate's Court writ.

Mr. Molteno moved to make absolute the rule nisi attaching a sum of money in the hands of L. P. Cauvin & Co., the proceeds of a sale, in satisfaction of a judgment obtained by applicant in the Resident Magistrate's Court, Cape Town.

It appeared from the affidavit of Mr. Cauvin that the money in question was the proceeds of a sale of furniture sold at the instance of respondent's wife, but to the greater part of which he (respondent) laid claim.

Mr. Molteno remarked that there was no time to obtain an affidavit from Mrs. Day but that she was in Court and was prepared to support Mr. Cauvin's affidavit.

Counsel observed that he was quite prepared to argue that the moneys in the hands of the auctioneer were executable under the Magistrate's Court writ.

Counsel was not heard on the last point.

Sir T. Upington appeared for the respondent, and said that he had never claimed the money

for a moment, and the costs ought to be borne by the applicant, who had forced unnecessary litigation.

Mr. Molteno said that if that were so the conduct of the respondent did not bear it out, because he filed no affidavit until Wednesday afternoon, though he had had a fortnight in which to do so.

The order was granted with costs.

IN THE ESTATE OF THE LATE ERNST G. RETIEF.

Sir T. Upington moved for leave to the executors of the estate and the tutors of the minor heirs to pay over to the liquidators of the Paarl Bank the net proceeds in their hands from the liquidation of the estate, in satisfaction of the call on twelve shares in the said bank, of which Retief was the former holder.

The order was granted.

IN THE MATTER OF THE PAARL BANK.

Sir T. Upington moved for sanction of the Court to the following compromises proposed to be effected by the official liquidators with debtors, shareholders, and past shareholders:

1. Estate late Daniel Gerhardus Herak and surviving widow, for the liability of the estate on fifteen shares, £3,750, offers cash payment of £1,625, and to surrender immovable property valued for £75 and all claim against Joachim J. Bohlman in regard to fifteen Paarl Bank shares purchased by him from the said estate.

2. Estate of the late Johannes Tieleman de Villiers and surviving widow offers for liability of the said estate on a promissory note of £221 15s. 6d. a cash payment of £100.

3. Estate of the late Ernst J. Retief offers for an expected liability of the estate on twelve shares cash payment of £1,765.

4. Estate of the late J. H. Blignaut, sen., offers for an expected liability of the estate on one share a cash payment of £830.

5. J. D. Retief, P. son, offers for his liability on balance of a promissory note for £714 17s. 8d. a cash payment of 10s. in the £.

6. Isaac Abraham Perold offers for his liability on mortgage bonds and promissory notes amounting to £1,354 a cash payment of £800.

7. Philip W. de Villiers offers for his liability of £1,900 a cash payment of £200.

8. J. P. Lotter offers for his liability on promissory notes for £1,602 7s. 8d. a cash payment of £100.

9. J. P. J. Dempers offers for his liability on promissory note of £85 a cash payment of £8 15s.

10. C. M. Swart offers for his liability on promissory note of £790 7s. 6d. a cash payment of £378 1s. 10d.

11. J. B. Blignaut, P. son, offers for his liability for a promissory note of £110 a cash payment of 5s. in the £.

12. Estate of J. J. Minnaar and surviving widow offers for the liability of the estate on sixteen shares £4,000, a cash payment of £300, and to surrender £150 in Paarl Bank notes.

18. F. P. Retief offers for his liability on promissory notes amounting to £1,004 a cash payment of £75.

The order was granted.

SUPREME COURT.

FRIDAY, FEBRUARY 19.

[Before Mr. Justice SMITH and Mr. Justice BUCHANAN.]

UNION BANK, IN LIQUIDATION V. BEIT.

Promissory notes—Guarantee—Surety and co-principal debtor—Signature—Forgery—Agency—Insolvency—Cession of rights—Faure v. Louw (1 Juta, 3)—McKenzie v. British Linen Co. (6 L.R. App. Cas. 82)—Barber v. Gingell (3 Esp., 60) and Morris v. Bethell (5 L.R.C.P., 47) discussed.

Mr. Searle and Mr. Graham appeared for the Bank, and Sir T. Upington, Q.C., Mr. Solomon, Q.C., and Mr. Schreiner, Q.C., for the defendant.

This was an action brought by the official liquidators of the Union Bank against the defendant for the sum of £168,000, alleged to be due under the following circumstances disclosed in the pleadings:

The declaration alleged that the plaintiffs, George William Steytler and Harry Gibson, were the duly-appointed official liquidators of the Union Bank, and that the defendant, Mr. Alfred Beit, was a speculator carrying on business at Kimberley and elsewhere, and that he was in December, 1889, and from thence to the present time, represented in this colony by one Max Michaelis, his duly-authorized general agent and manager.

That the defendant was indebted to the plaintiffs in their said capacity on two promissory notes, the one for £58,800, dated 12th February, 1890, and falling due 1st December, 1890, and purporting to be made by the said Michaelis for and on behalf of the defendant, in favour of W. A. Lipfert & Co., and by the latter endorsed and discounted with the said bank, and the other for

£11,400 dated 31st May, 1890, and falling due on 2nd September, 1890, and purporting to be made by the said Michaelis for and on behalf of the defendant, in favour of W. A. Lippert & Co., and by the latter endorsed and discounted with the said bank.

That the defendant was also indebted to the plaintiffs in their said capacity in the sum of £104,085 2s. 6d. upon a written guarantee purporting to be signed by the said Michaelis for and on behalf of the defendant, and dated 21st December, 1889, by which guarantee the defendant guaranteed the payment as surety and co-principal debtor of the sum of £104,085 2s. 6d., being the amount of a certain promissory note made by the said W. A. Lippert & Co., and discounted with the said bank, and which promissory note was dated 21st December, 1889, and fell due 1st December, 1890.

That on the 7th August, 1890, the estate of the said W. A. Lippert & Co. was compulsorily sequestrated, and thereafter the plaintiffs, in their said capacity, proved upon the insolvent estate for the said promissory notes of £58,800, £11,400, and £104,085 2s. 6d. That dividends to the amount of £245 8s. had been received from the said estate, saving which the said notes still remained unpaid, and the defendant, though requested so to do, refused to pay the said notes, or the amount of the said guarantee, or any part thereof, although the plaintiffs had offered, and hereby again offer, to cede and make over to the defendant all their rights upon the said promissory notes against the said insolvent estate, inasmuch as the said defendant denied that the said notes and guarantee were signed by the said Max Michaelis.

The plaintiffs claimed :

(a) The sums of £58,800, £11,400, and £104,085 2s. 6d., with interest thereon from 7th August, 1890, less the amount of £245 8s.; the plaintiffs tendering a cession of all their rights against the insolvent estate of W. A. Lippert & Co. upon the said notes.

(b) Such other relief as might seem meet, with costs of suit.

In case the Court should find that the said promissory notes and guarantee had not been signed by the said Max Michaelis for and on behalf of the defendant, but not otherwise; the plaintiffs pleaded alternatively, as follows :

1. They beg to refer to paragraphs 1 and 4 of their first count.

2. During the year 1888 and 1889, until in or about the beginning of July, the said defendant was represented in this colony by his duly-authorized general agent and manager, E. Bruoh; and from that date, and up to the present time, by the said Max Michaelis.

3. During the said years one W. A. Lippert, carrying on business in Cape Town as W. A. Lippert & Co., speculated largely in diamond and gold

shares, and dealt largely with the said bank by way of discounting promissory notes and obtaining advances of money, and also dealt largely with the said defendant by way of buying and selling shares.

4. In the month of April, 1889, the said Lippert, trading as aforesaid, was largely indebted to the said bank upon an overdrawn account and promissory notes either made or endorsed by him and discounted with the said bank. Among the said liabilities were :

(a) An overdraft for £61,000 secured by certain diamond and gold shares, and by a guarantee for £5,000 purporting to be signed by the said E. Bruoh for and on behalf of the defendant.

(b) Certain promissory notes, aggregating £28,800.

(c) A promissory note for £11,400, due in August, 1889.

(d) A promissory note for £5,700, due in August, 1889, and secured by 400 shares in the De Beers Consolidated Mines (Limited); and

(e) Two promissory notes for £18,500 and £11,400, due in July, 1889.

All these promissory notes purported to be made by the said E. Bruoh for and on behalf of the defendant, and were endorsed by the said Lippert & Co., and discounted by him with the said bank. The signatures to the said promissory notes, aggregating £28,800, and the notes for £11,400, £5,700, £18,500, and £11,400, purporting to be signed as aforesaid, were not written by the said Bruoh, but by the said Lippert.

5. The said Lippert (trading as aforesaid) was at the said date largely indebted to the Standard Bank of South Africa, and being pressed by the said Union Bank for payment of certain liabilities, applied to the said bank for extended time and facility, and thereupon it was agreed between the said Lippert and the said bank in the said month that the said bank should take over his liabilities to the said Standard Bank; that Lippert should give to the said Union Bank one promissory note for £110,000 at eight months for certain of his liabilities, exclusive of the promissory notes or acceptances of the defendant, namely, those purporting to be signed E. Bruoh as aforesaid, which it was agreed should be renewed, and that the defendant should, to the extent of £20,000, guarantee any deficiency between the amount of the said promissory note for £110,000 and the realised prices of the shares held against the said note as security. The said bank thereupon took over the said liabilities, and the said Lippert signed and gave the said promissory note, and also gave a guarantee for £20,000 as aforesaid purporting to be signed by the said E. Bruoh for and on behalf of the defendant. The said E. Bruoh was at the date of this agreement fully aware of the existence of the guarantee of £5,000, and of

the promissory notes mentioned in paragraph 4 and of the terms thereof, and that they were held by the said Union Bank, and was fully aware of the agreement above mentioned, and it was with his knowledge and concurrence that the said agreement was entered into, and at or about the same time that the said agreement was entered into the said Bruch, for and on behalf of the defendant, paid the said Lippert, by way of drafts and cheque, a sum of £80,000, whereby the said Lippert was enabled to take up certain other promissory notes, some of which were held by the said Union Bank with scrip attached, including the aforesaid note of £5,700, which scrip to the value of about £80,000 was handed to the said E. Bruch in his capacity as security and for realisation. The said E. Bruch communicated the aforesaid facts to the defendant, who adopted the acts of the said Bruch.

6. The two said promissory notes for £18,500 and £11,400 were not paid in July, 1889, but were renewed in terms of the said agreement aforesaid. The said renewals were signed E. Bruch p.p. A. Beit, the defendant, but the signature was not written by the said Bruch but by the said Lippert. The said Bruch and the defendant knew that the said notes had not been paid, and that they had been renewed as aforesaid, and it was with their knowledge and concurrence that the renewals were made and given as aforesaid. The said Max Michaelis was also aware of the said facts, and when the said renewals fell due in December, 1889, they were presented to him for payment, and were duly paid with the knowledge and concurrence of the defendant.

7. The said promissory notes aggregating £28,800, and all of which fell due prior to December, 1889, and the promissory note for £11,400 which fell due in August, 1889, were not paid but were renewed in terms of the aforesaid agreement. Some of the said renewals were signed E. Bruch p.p. the defendant, and some were signed Max Michaelis p.p. the defendant, but the said signatures were not written by the said Bruch and Michaelis but by the said Lippert. The said Bruch, Michaelis, and the defendant knew that the said notes had not been paid, and that they had been renewed as aforesaid, and it was with their consent and concurrence that they were so renewed. The said note for £11,400 was renewed from time to time, the last renewal being dated 31st May, 1890, and falling due on the 2nd September, 1890, and purporting to be signed by Max Michaelis for and on behalf of the defendant.

8. In the month of December, 1889, it was agreed between the said Union Bank and the said Lippert that the said bank would renew the aforesaid promissory note of £110,000, which by realisation had been reduced to £104,085 2s. 6d. for another twelve months, in consideration of which

the defendant was to guarantee the payment of the said note as surety and co-principal debtor, and was to pay the two promissory notes aforesaid for £18,500 and £11,400, and was to pass his promissory notes for £25,000 in favour of the said W. A. Lippert & Co., which were to be discounted with the said Union Bank, and the proceeds of which were to be placed in the said bank to the credit of the said Lippert. Thereupon the said defendant, through the said Michaelis, paid the two promissory notes as alleged in paragraph 6; the said Lippert handed to the said bank promissory notes for £25,000, purporting to be signed by the said Michaelis for and on behalf of the defendant, and handed to the said bank a promissory note for £104,085 2s. 6d., dated 21st December, 1889, and falling due 1st December, 1890, signed by the said Lippert, and bearing across it a written guarantee of payment of the said note as surety and co-principal debtor, purporting to be signed by the said Michaelis, for and on behalf of the said defendant, and thereupon the said bank handed up to the said Lippert the aforesaid guarantee of £20,000 to be delivered to the said defendant. The said overdraft of £61,000 secured by the aforesaid guarantee of £5,000 was not included in the said promissory notes for £110,000 and £104,085 2s. 6d.

9. The said promissory notes for £25,000 were, together with the renewals of the aforesaid £28,800 included in one promissory note for £53,800, dated 12th February, 1890, and falling due 1st December, 1890, and purporting to be signed by the said Michaelis for and on behalf of the said defendant.

10. At the date of the liquidation of the said bank the said notes for £53,800, £11,400 and £104,085 2s. 6d. were unpaid, and the said bank had until that time no notice or knowledge that the notes and the guarantees had not been signed by the said Bruch and the said Michaelis in their capacity aforesaid.

11. The plaintiffs submit that even if this Honourable Court should find that the said two promissory notes and the guarantee were signed not by the said Michaelis, but by the said Lippert that by reason of the premises and the course of conduct therein set forth whereby the defendant led the said bank into the belief that the signatures upon the said promissory notes and guarantee were genuine and further by his conduct authorised and ratified the acts of the said Lippert, the defendant is liable to pay to them in their capacity the said sums of £11,400, £53,800, and £100,085 2s. 6d.

The plaintiffs claim :

(a) The sums of £53,800, £11,400, and £104,085 2s. 6d. with interest thereon from 7th August, 1890, less the amount of £245 8s., the plaintiffs tendering a cession of all their rights in respect of

the promissory notes and guarantee against the insolvent estate of W. A. Lippert & Co.

(b) Such other relief as to this Honourable Court may seem meet, with costs of suit.

The following pleas were filed :

1. The defendant admits the allegations in the first paragraph of the first claim in the declaration contained, save that which avers that the defendant was at the date of the declaration represented in this colony by the said Max Michaelis, his duly authorised general agent and manager. The defendant specially says that the said Max Michaelis ceased to represent him as aforesaid in the month of May, 1891, when the said Max Michaelis left this colony for Europe, where he now is.

2. The defendant denies the allegations in the second and third paragraphs of the said first claim respectively contained.

3. As to the allegations in the fourth paragraph of the said first claim in the declaration contained, the defendant says he admits :

(a) That the said estate was compulsorily sequestrated as alleged.

(b) That he refuses to pay the said notes or the amount of the said guarantee, or any part thereof.

(c) That he denies that the said notes and guarantee were signed by the said Max Michaelis.

Save as above admitted the defendant says that he has no knowledge of any other allegation contained in the said fourth paragraph of the said first claim, and he does not admit any of such other allegations.

Wherefore the defendant prays that the first claim in the declaration contained be dismissed with costs.

As to the allegations contained in the first paragraph of the alternative claim of the plaintiffs set forth in the declaration, the defendant craves leave to refer to the averments made in the first and third paragraphs of his plea above pleaded to the said first claim of the plaintiffs.

The defendant denies the allegations in the second paragraph of the said alternative claim contained, save in so far as he admits the representation of the said Max Michaelis in manner set forth in the first paragraph of the said plea to the said first claim of the plaintiffs.

The defendant has no knowledge of the allegations contained in the third paragraph of the said alternative claim, and he does not admit any of them ; but he specially denies that the said W. A. Lippert, carrying on business as aforesaid, dealt largely with him by way of buying and selling shares as alleged.

The defendant has no knowledge of the allegations contained in the fourth paragraph of the said alternative claim, and does not admit any of them save in so far as it is alleged that any signature of the said Bruch was not made by him,

As to the allegations contained in the fifth paragraph of the said alternative claim the defendant says he has no knowledge of the position of the said Lippert trading as aforesaid in connection with the said Standard Bank of South Africa and Union Bank, or of his dealings therewith as alleged in the fifth paragraph, and he does not admit any of the said allegations. The defendant specially denies the other allegations in the said fifth paragraph contained.

The defendant denies the allegations made by the plaintiffs in the sixth, seventh, eighth, and ninth paragraphs respectively of their said alternative claim save in so far as it is therein stated that the said signatures of the said Bruch and the said Michaelis were not made by them respectively.

The defendant has no knowledge of the allegations contained in the tenth paragraph of the said alternative claim, and he does not admit the same.

The defendant opposes the submission of the plaintiffs in the eleventh paragraph of their said alternative claim, and he specially says that he is not liable to pay to plaintiffs the said sums or any sum whatever in the premises.

Wherefore the defendant prays that the said alternative claim of the plaintiffs be dismissed with costs.

Upon these pleadings issue was joined.

Mr. Searle called

Mr. G. W. Steytler, who stated that he was one of the liquidators of the bank and one of the trustees in the insolvent estate of W. A. Lippert, which, he said, was sequestrated on August 9, 1890. In the custody of the bank he found the promissory notes now sued on. They were part of the assets of the bank. They fell due, two of them on December 1, 1890, and the third on September 1 of the same year, consequently all were overdue. All were unpaid. From the books of Lippert and those of the bank he found that there were a large number of transactions between Lippert and the bank. There appeared also, from the books of the bank and of Lippert, to have been a large number of transactions between Lippert and Beit. He had the books in court to bear out that statement, and it appeared that the first entry in connection with Lippert's transactions was on March 1, 1888. On folio 88 of the liability ledger he found a reference to the two bills, one of £18,500 and the other £11,400, now in suit. Those bills had been discounted by Lippert, and purported to be signed on behalf of the defendant. There were several bills purporting to be signed by the defendant, some in the bank's possession and some in that of Lippert. He found that on April 15, 1889, Lippert owed the bank £285,076 0s. 7d ; in respect of Beit's alleged paper, £70,800 ; other promissory notes, £18,082 18s. 6d. ; overdraft, £64,974 17s. 5d. ; bills discounted

as maker, £18,600; and acceptances discounted, £123,298 4s. 8d., against which the bank held securities valued at £190,156 9s., against the whole account. The valuation was made by Mr. Bolus, and the figures calculated by witness, who testified to the accuracy of his calculation. The overdraft was secured by a guarantee of £5,000 of A. Beit. That document was dated July 2, 1888, and was in the bank's possession. The guarantee was apparently signed by E. Bruch for Beit. The guarantee was accepted, and an advance given on certain securities, some of which, valued at £1,000 odd, were still in the possession of the bank. He had made an estimate of the market value of those securities. It was at the present time about £1,000. With regard to the rest of the securities, they had been sold from time to time.

Mr. Justice Buchanan: You cannot tell when they were sold?—No, my lord; I cannot trace them. I can only find to whom they were delivered. The amount of the securities appears to be £12,344.

Mr. Searle: Certain securities are given on the back of the guarantee. These Mr. Steytler says are now worth about £1,000.

Mr. Justice Smith: Would there be any means of ascertaining the exact value of these securities?

Sir T. Upington: The real point, my lord, is whether these documents are forgeries or not.

Mr. Searle: I don't think my learned friend is in earnest. The question is much more than that.

Witness: There would be no difficulty in finding out the values. Resuming his evidence: He found from the books of Lippert that upon the 15th April, 1889, a transaction took place between Lippert and Bruch, Lippert made up a statement of his liabilities on the 15th April, and on that statement the bills for £18,500 and £11,400 appeared. Both bills were due on the 10th July. In the same statement there was a deed of suretyship for £5,000.

Mr. Searle: Certain figures are endorsed upon the statement, my lord, which it is admitted are in Mr. Bruch's handwriting. The account is drawn out presumably by one of Lippert's clerks, and signed by Lippert.

Mr. Searle pointed out that in the original statement there was a large blot obliterating the words "A. Beit," which blot did not appear in the press copy produced, in which the name was perfectly clear.

Witness (resuming) said that on the 15th April an advance of about £80,000 was made by Bruch to Lippert. The £80,000 was used to extinguish a number of bills amounting, according to a list produced, to £70,880 16s. 9d. Some of the bills were taken up on the 15th April, and some on the 16th. There were two credits for this advance, one a cheque by Beit for £23,841, dated 15th April, on the Cape of Good Hope Bank.

Mr. Searle: We have given the defendant notice to produce that cheque, but he is unable. We produce an account rendered by Mr. Michaelis to Mr. Lippert, and in that account, rendered in January, 1890, the cheque for £23,841 is shown. The account was rendered to show that the securities held by Beit were not sufficient to cover the amount of money disbursed. It also corresponds with Lippert's books.

Witness (continuing) said that £56,500 was a cheque drawn by Lippert on the Cape of Good Hope Bank on the 15th April.

You have told us that the £80,000 appeared to have taken up a number of bills. With regard to the cheque, what was that for?—Also for bills, including one of £5,700. Except this bill, all were outside the Union Bank.

With regard to the cheque, how did that appear in Lippert's books?—With De Beers shares.

Were certain De Beers shares handed over?—That I cannot say.

There were 400 De Beers shares attached to the bill for £5,700?—Yes.

Now, with regard to the scrip that was attached to these bills, can you tell us anything in regard to the scrip attached to the bills that were taken up with the £80,000?—Only what I gather from the correspondence.

Mr. Searle: The correspondence will tell us that certain scrip was handed to Beit, and this scrip seems to be identical with that attached to the bills which were taken up by Beit?—Witness: Yes.

You cannot say that it is all identical?—Oh, no; but some of the scrip was the same.

I believe you can instance some such as Robinsons, Langlaagtes, Bothas, and De Beers?—Yes.

And the figures in some instances were identical?—Yes.

Will it be shown from the books that two promissory notes of £18,500 and £11,400 passed through the Union Bank?—It appears in the books.

These bills are dated April 6, payable on the 10th July. They come from the defendant's possession. I put them in. The bills produced were renewed?—Yes.

You cannot tell us the date of the bills? No, the books do not disclose that; but they were renewed in July to become due in December; I think on the 26th December.

According to the books of the bank the renewals of the bills were paid?—Yes.

Were they paid on December 27?—They are debited in the books of the Union Bank as paid on the 28th December.

These bills were renewed by renewals dated July 10. The draft will show that the bills taken up were for £18,500 and £11,400.

Mr. Justice Buchanan: These actual original

bills could not be obtained, but the renewals were paid.

Mr. Searle: That is so. They are dated 6th April, and did not fall due until the 10th July. On the 15th July certain bills were taken up, but they were not these bills.

Mr. Justice Buchanan: Have you got the draft belonging to these bills?

Mr. Searle: Yes, the draft is dated 20th December, and took up the promissory notes amounting to £18,500 and £11,400.

Mr. Justice Buchanan: Do these bills come from Beit's possession?

Mr. Searle: I have not got the actual bills that were paid; as a matter of fact, these are the bills which were sent to Mr. Beit at Kimberley.

Mr. Justice Smith: It is important to know when they were paid.

Mr. Searle: There is no doubt that they were paid on the 26th December. (To witness) There is another promissory note for £11,400. This fell due in August, 1889, was subsequently renewed from time to time, and fell due in September, 1890. The last renewal is dated May 31, 1890. Has that bill since been paid?—Witness: It has not been paid. There are 800 De Beers shares attached to that bill in the books of the bank.

Have you drawn up a statement showing W. A. Lippert's liability to the bank on the 26th December, 1889?—Yes, and the total liability was £488,875 11s. 6d.

What were the securities valued at on that date?—At £259,964 17s. 6d.

Did you take the value of these securities from Bolus?—Yes, and my calculations are based on the market price of the stock on December 26, 1889.

Now, on the 30th July, when the bank stopped, can you say what Lippert's liabilities were?—£554,455 18s. 10d.

What is the value of the security you hold against that?—£149,802 8s.

You have not regarded personal securities at all?—No. This is the actual market value of the scrip on that date.

Will it show in your statement the increase in Beit's liability, so to speak, on bills purporting to be in Beit's name?—Yes, on the 15th April there were bills in Beit's name to the extent of £70,800, and on the 26th December to £155,417 19s. That includes the guarantee for £104,000. That came into the bank about the end of the year. On the 30th July, 1890, the liability of Mr. Beit, according to the books of the bank, was £167,053, and the amount now sued for, less about £1,681, by which the liability had been reduced. From the books he could state that the loss occasioned to the bank by Lippert on April 15, 1889, would have been £94,990 11s. 7d. The bank was unsecured to that extent. In December, 1889, it was some-

thing over £200,000, and in July, 1890, considerably over £400,000. The sum of £245 had been received as proportionate dividend in regard to these bills, and that amount had been tendered to the defendant.

By Sir T. Uppington: He had no knowledge whatever of Michaelis's handwriting, nor of Bruch's. The two bills renewed on July 10 to December 27 could not be found. They were not in the possession of the bank. He had found no trace of them as trustee in Lippert's estate. They had not the bill for £5,700 because it would be retired when it was paid.

Sir T. Uppington: How do you make that out?—Witness: We take all the securities that were delivered.

Do you mean to say that these are the securities mentioned on the back of the guarantee?—Yes.

You said it would be utterly impossible to arrive at a conclusion of what actually was the value?—No, what was actually paid into the bank. The securities at the dates they were delivered represented £12,944. We cannot give the items representing this, as we cannot identify them.

Can you tell in whose handwriting the body of that guarantee for £5,000 is?—It looks like Hall's handwriting.

With reference to this cheque for £23,841, I think you have put in a statement as to how that was to be dealt with. According to the cursory glance I gave that statement the cheque was entirely against De Beers shares. (Looking at books at a particular account pointed out by witness). Yes, by these my surmise is correct. There were 1,766 De Beers. (To witness) Then the amount of the drafts—£56,500—was against a specific advance on account of certain other shares?—No.

For this £80,000 that was advanced by these drafts and this cheque I understand you to say you can only trace one bill signed by Mr. Beit?—Yes, and that bill had 400 De Beers shares attached, was held by the Union Bank, and was for £5,700.

Sir Thomas Uppington: The money, my lord, that was obtained from Mr. Beit as against the shares that were pledged to him, was utilised for paying other bills than Beit's, with the exception of this one for £5,700.

Sir Thomas Uppington: Can you trace in any of the books of the Union Bank any notice to Mr. Beit or any member of his firm of any transaction with Lippert?—No.

Can you trace anything before the closing of the bank of any attempt made to arrest W. A. Lippert?—Nothing beyond what is known to the public.

Is there any trace of their doing anything?—No, not in the books.

I believe that Lippert wrote a letter to the chairman of the bank at one time, expressing his willingness to come out here?—I saw that letter.

The letter was then handed in and read by Sir Thomas Upington, as follows:

"To Mr. JOHN R. ROSS, Chairman of the Union Bank.

25th July, 1890.

"Sir,—I have to-day placed myself at the disposal of the Standard Bank of South Africa here, and am ready to submit to anything they may desire me to do. I herewith beg to do the same with you and to inform you that I am prepared to come out to the Cape at once whenever called upon to do so, or to act in any way you may desire, and that I shall follow any instructions you may give or have meanwhile given. As, however, my presence in Cape Town may not be wished for, I shall not leave until I have either wire or other instructions from you, or until I have again communicated with you.—W. A. LIPPERT."

Mr. Justice Buchanan: At that time the bank had stopped?—Yes, my lord.

Sir T. Upington: You told me this morning you could not produce the bill for £5,700 referred to? No, I could not, nor have I been able to find it out since.

Mr. Searle (re-examining): With regard to that bill it would not be amongst the bank assets?—No, it was retired by Lippert. He was the endorser. It is common mercantile practice for the endorser to retire bills.

Was this letter handed to you when it arrived?—Mr. Ross brought it to me. The bank had been in liquidation for some weeks, and there was a warrant out for Lippert.

You do not know where Lippert is now?—No.

Are you able to say generally that you are clear from the books of the bank; that these bills, £12,500 and £11,400 were actually renewed?—As clear as possible. The one for £5,700 was held by the Union Bank. None of the other bills were Union Bank bills.

Witness then handed in a statement showing a guarantee from Beit of £104,000.

By the Court: Lippert could not have settled his liabilities to the bank on the 20th December, 1889. If the guarantee for £104,000 was good the bank's loss would be less by that amount, but still the bank would lose heavily. Lippert's liabilities were not covered by Beit's guarantee.

MR. HALL'S EVIDENCE.

Henry Hall, cashier to the late Union Bank, examined by Mr. Searle, said he had had no direct communication with either Bruch or Beit. He had no communication with Michaelis prior to July, 1890. The guarantee for £5,000 was in his (witness's) handwriting. The bank was pressing Lippert for the reduction of his overdraft, or for

further security, in June, 1888, and Lippert said he would get his cousin (Beit) to be security for him. Witness put the guarantee into his own handwriting, so that it should appear as though the bank had assumed the initiative, and was pressing for payment. The guarantee as a document was the joint production of witness and Lippert. Subsequently Lippert returned the guarantee, bearing a signature purporting to have been executed by Bruch for Beit. That guarantee ever afterwards remained in the possession of the bank. Witness knew that Beit was cousin to Lippert, and Beit was reputed to be a man of large means. He believed that Beit had once been in Lippert's employ. Prior to April, 1889, witness made inquiries of the Standard Bank as to Beit's position. At that time there were a number of bills in the Union Bank purporting to bear the signature of Bruch for Beit, and in addition a number of bills had been re-discounted by the Standard Bank. He remembered the bills for £12,500 and £11,400, dated 10th April, being brought to the bank by Lippert. Immediately the bills were taken to the Standard Bank they were credited to Lippert in the teller's cash-book. They did not appear in Beit's folio, but were taken as cheques might be taken to the Standard Bank, and discounted at once.

Mr. Justice Buchanan: What was the object of handing the bills to the Standard Bank the same day?—To receive the cash.

Why did you discount the bills if you had not the money?—For the very reason that we had not the money, my lord. Continuing, the witness said the cheques were discounted by the Union Bank to take up some of Lippert's cheques upon other banks, particularly the Bank of Africa. There was nothing at all unusual in his dealing in such a way with the bills. He had re-discounted before.

By Mr. Justice Buchanan: He discounted the bills and then immediately re-discounted them, for the reason that he could not get the money from Lippert, and he took the paper on account of cheques held by him, and not sent to the banks at Lippert's special request.

By Mr. Searle: Mr. Lippert's course was that if he had, say, £80,000 worth of cheques, he would send them across with a message to witness asking him not to send them to the bank till next day. Next day he would ask for further delay, and so it went on for days, whilst witness had already paid Lippert the amounts due on the cheques. When he discounted these bills, he handed the cheques back to Lippert. On the 19th April, 1889, a meeting was held at the bank, at which there were present four or five directors, the accountant, the assistant accountant, witness, and Lippert, and the latter then presented a statement showing the condition of his affairs.

An arrangement was come to on the 19th of April with regard to Lippert's affairs, and it was signed on the 28th of the same month. The bank arranged to take over certain time bargains of Lippert's, and he signed a promissory note for £110,000. Many of the matters then taken over were outside the Union Bank altogether. Part of the arrangement was that Lippert should obtain Beit's guarantee to the extent of £20,000, and he did produce a guarantee purporting to have been signed on behalf of Beit for that sum. That guarantee was given back to Lippert later, when he released it by giving a further guarantee and paying the paper in respect of which it was given.

Examination by Mr. Searle continued: It was a portion of the agreement that Beit's acceptances should be renewed. The promissory note for £110,000 was to be due at eight months. After that the acceptances of Beit's were renewed from time to time. While Mr. Bruch was in the Colony they were signed by Bruch, then by Beit, and then by Michaelis. As far as he knew, and as far as he thought, they were undoubtedly genuine signatures. At the same time the Union Bank took over certain liabilities of Lippert's to the Standard Bank. After that witness rediscounted the bill for £110,000 in the Standard Bank. There was an agreement with the Standard Bank in writing. Subsequently the two bills, £18,500 and £11,400, due on the 10th July, were re-nued so as to be due on the 27th December. Two proposals were made by Lippert to the bank in December, 1889.

The proposals were then read by Mr. Searle, and the second one was to the effect that the bank should take the joint promissory note of Lippert and Beit for £104,000, on condition that the note in existence for £24,900 should be paid. The £104,000 to be advanced was against scrip detailed on the back of the promissory note.

Mr. Searle: Was it agreed upon the basis of that document, drawn up by you, that the promissory notes should be paid, and hereafter new promissory notes should be signed?—That was the basis of the agreement in December, 1889.

Mr. Justice Smith: And your bank manager took a note for £104,000 without communicating with the alleged principal or his agents?—Yes, my lord.

Mr. Searle: Did this draft of £24,900 pass through your hands, Mr. Hall?—Yes, on the 20th December, 1889.

When did you get the proceeds of it?—They were credited on the 28th December.

Mr. Justice Smith: Who paid the draft?

Mr. Searle: Mr. Michaelis. If on the 19th April, 1889, the bank had not received the guarantee for a further £20,000, they should have closed Lippert up.

Cross-examined by Sir T. Upington: He was not prepared to say that the system of banking pursued was not a good system, nor was he prepared to swear that it was a sound system; that was, it was not a perfectly sound system.

Sir T. Upington: How many of your directors were holders of scrip (gold scrip) at the time of the collapse against obligations to the bank?

Mr. Searle: I do not see what bearing this has upon the case.

Sir T. Upington: It has a great deal of bearing upon the way the business of banking was done.

Mr. Justice Smith: I think it is perfectly obvious that it was not a sound system.

Sir T. Upington: And you were a party to this unsound system of banking on your own admission?—It seems so.

Cross-examination continued: The books of the bank would show when Lippert commenced dealing with the bank. His dealings with Lippert were partly with the advice and consent of the directors. He accepted at thirty days drafts on various firms at Kimberley and Johannesburg to the extent of £155,000, and discounted bills for £18,500 and £11,400 for Lippert on his own responsibility. The guarantee for £5,000 was in his (witness's) handwriting. It was written in the bank, but not in the presence of Lippert. He could not say whether Mr. Beit was in the Colony at the time. The guarantee was signed by Bruch for Beit. He knew that Beit carried on business at Kimberley and that Bruch was his agent. He did not ask for Bruch's power of attorney, or for the authority upon which the bills were signed. It was the general custom of banks in the country to deal with customers without requiring authentication of signatures. When a man opened an account the bank obtained his signature. Mr. Beit was not an opener in this sense, and authentication of his signature was not sought. He made inquiries of Lippert concerning the genuineness of the signature, and of Lippert alone. He had had personal transactions with Lippert to the extent of £15,000. Lippert was retarding witness in his business. Had witness left Lippert alone he would have been better off to-day. Witness's bills were discounted by the Standard Bank. The bills for £18,500 and £11,400 were taken as cash by the teller of the Union Bank, and were taken to the Standard Bank by the messenger, Smith. Subsequently they received a memorandum from the Standard Bank stating that the account of the Union Bank had been credited with the amount of the bills, less 7 per cent. discount. Lippert had given cheques for various amounts, and requested that they should not be presented, just as others had done before. These cheques on other banks were lying in the Union Bank, and witness on his own

responsibility began to press Lippert at the beginning of April. The directors knew nothing of the cheques at all. They were told afterwards, on the 19th April, 1889. The directors only knew a portion of Lippert's position, and not all about it. Witness did, but did not tell the Board. [Sir T. Uppington: No wonder the bank smashed.] He had no communication either with Michaelis or Bruch concerning the guarantee for £20,000. He accepted the bills for £24,900 as cash, discounted them, and had them re-discounted by the Standard Bank without disclosing anything to the Board. The Standard Bank discounted them in the ordinary way and took their 7 per cent. The mode of dealing between the Union and Standard Banks was that the latter discounted the paper of the former at 7 per cent. He did not mean that course was always followed. All that the Standard Bank wanted was its 7 per cent. when the bills were discounted, and that it got. The Union Bank messenger was sent with a quantity of paper, and it was discounted. The Union had an account with the Standard, where the former was credited with amounts obtained in this way. Standard Bank books would show the whole of those dealings, and would coincide with the Union Bank books. When the Union sent paper to the Standard it was not always done under resolution of the Board of the Union. Sometimes their consent was asked and obtained sometimes it was not. He discounted when he required money. It was true that according to his instructions as cashier he ought to have placed the matter before the directors. The only instance when he did not do so was in regard to the two bills, one for £18,500, and the other for £11,400. It was not the fact that he discounted a large number of bills without consulting the Board. He only did that in two cases. He had never seen Bruch, did not know Michaelis until a few days before the bank stopped, and had had no other communication with Mr. Beit save as regarded the present case. He gave up the £20,000 guarantee when he took that of £104,085. The £20,000 document bore Mr. Beit's signature, it was true, but he did not return it to that gentleman, for the reason that inasmuch as Lippert presented it, he considered it should be handed over to him. He could scarcely say what was the custom of the bank respecting these guarantees, because there were very few indeed of them for so large a sum as £20,000. He had seen the documents sued upon. He did not feel called on to offer any opinion as to their genuineness. The conclusion he had arrived at was that if a man told him a document was forged, he supposed that man had something on his side. He did not think Bruch's signature, or what he was told was Bruch's genuine signature, differed materially from the signature repre-

sented on the documents in the suit as being Bruch's.

Sir T. Uppington (continuing his cross-examination): There is a letter written on December 24, addressed to the Union Bank, and purporting to be signed by Beit, in whose handwriting is the body of that letter?—Witness (examining the letter): In that of Mr. J. M. Marquard, then assistant accountant at the Union Bank.

You see the date, December 24? Is that Lippert's handwriting?—It looks uncommonly like it.

Mr. Searle (re-examining): With regard to those drafts, the signatures of which you have been asked about, you have never seen them before?—No, they did not come through the Union Bank.

In reply to further re-examination, the witness stated that the Union Bank kept two accounts with the Standard Bank, the clearance account and the discount account, and that this system of re-discounting was in force in the bank before witness became cashier. He would have been very much better off if he had not dealt with Lippert in any way. On the 25th July he received an intimation that there was something wrong with the bills, and he went to Kimberley and saw Mr. Michaelis. He saw him on the 27th July.

By Mr. Justice Buchanan: Lippert left the Colony about 5th February, 1890.

Mr. Searle: You were asked by my learned friend with regard to this guarantee. It was attached to the promissory note and given into the hands of the Standard Bank?—Yes.

And then when the notes were paid and a new guarantee was signed, that promissory note and guarantee were handed back in the ordinary course of business?—Yes.

Mr. Justice Smith: Extraordinary business you mean.

Mr. Searle said he had still another witness, Mr. J. R. Ross, who was unfortunately ill with influenza and not in a position to give evidence.

Mr. Tredgold was appointed a commissioner to examine Mr. Ross, Mr. Justice Buchanan observing that argument would have to be reserved until the report of the commissioner was received.

Sir T. Uppington said he purposed to commence the defence by having all the correspondence which had passed between the parties, and which really showed the complete history of the case, read in court. When the correspondence had been read, he could then shorten considerably the examination of Mr. Beit and Mr. Michaelis, and he thought if the Court adjourned until the next morning, he could then dispose of his side of the case by one o'clock.

The Court adjourned at half-past four until Saturday morning.

SUPREME COURT.

SATURDAY, FEBRUARY 20.

[Before Mr. Justice SMITH and Mr. Justice BUCHANAN.]

THE UNION BANK V. BEIT.

The hearing of this case was resumed. Mr. Searle and Mr. Graham appeared for the plaintiffs; and Sir T. Upington, Q.C., Mr. R. Solomon, Q.C., and Mr. Schreiner, Q.C., for the defendant.

Mr. H. Hall, recalled at the request of Mr. Justice Smith, said that when the two bills were discounted at the Standard Bank there were certain cheques in the Union Bank which witness held over at Lippert's desire. They were drawn by Lippert on several banks. He particularly remembered the Bank of Africa. They were made payable to "cash," and when paid into the Union Bank were at once placed to Lippert's credit. The course of dealing was that Lippert sent over certain cheques, and drew against them, and then asked that they should not be presented next morning, to which witness agreed. When the next morning came Lippert requested a further postponement, and that went on for some days.

By Mr. Justice Buchanan: Lippert, when he deposited the cheques at the Union Bank, established a credit.

By Mr. Searle: Lippert left the Colony about February, 1890, and left a general power of attorney with Mr. Otto Capelle, who presented the £58,000 bill and the renewals of the £11,400. All the others were presented by Lippert or one of his clerks.

By Sir T. Upington: The cheques were presented in the form of a deposit of credit. The amounts would be detailed in the teller's cash-book. After the collapse of the bank, witness took charge of the keys of Lippert's safe and office, but did not examine the safe. He was not aware then, but had heard since, that in the safe were some blank bills, purporting to be signed by Mr. Beit. That was before the sequestration of Lippert's estate.

By Mr. Searle: He had held over cheques in other cases besides Lippert's, in the ordinary way of business.

By Mr. Justice Buchanan: That practice was not unusual at the time when the share boom was on. A man could not get his money until he delivered the scrip.

Mr. G. W. Steytler, recalled, produced a minute-book which he said was known as the "Secrecy Minute-book," and which he supposed

contained the minutes of secret or special meetings of directors. It also contained the secrecy bond sworn to by the directors. He also produced the ordinary minute-book of the bank, which was a different volume altogether. The witness corrected a mistake in his previous evidence by stating that the bill for £5,700 appeared to have been paid. The payment, he said, seemed to have been anticipated, the bill which matured in August being taken up in April.

MR. BEIT'S EVIDENCE.

Mr. Alfred Beit was then called by Sir Thomas Upington, when the following examination took place:

I believe you are a director of the British South Africa Company and a life governor of the De Beers Consolidated Mines (Limited)?—Yes.

And reside mainly in London?—Yes.

Your firm carries on business under what title?—Wernher, Beit & Co.

Were the partners in 1889 the same as at the present time?—In 1889 the firm was Jules Porges & Co.

Who were the members then?—Jules Porges, Wernher, and myself.

Did you also then carry on a business in Kimberley?—Yes.

The same partners?—Yes. Subsequently the firm was changed into that of Wernher, Beit & Co. That was on the 1st January, 1890. Porges went out, and the firm consisted of Wernher, Michaelis, and myself. We continued to carry on business in Kimberley under that title.

And you have continued so still?—I continued up to a certain time.

I believe you are a cousin of W. A. Lippert?—Yes.

It is alleged here that Lippert, before his departure from this country, had large dealings with you in gold and other shares; is there any truth in that?—That is not so. I have made a statement showing all my transactions with Lippert. These transactions were confined to two, with the exception of the advance made by Ernest Bruch of £80,000.

Did you of your knowledge, or did your firm, have any promissory note transactions with Lippert, or bills of exchange?—Not to my knowledge.

Mr. Ernest Bruch appears to have held your general power of attorney in this colony?—Yes, up to July 80, 1889. Mr. Bruch has since died at Johannesburg. When Bruch ceased to have connection with our business Max Michaelis undertook the conduct of the business here, and continued to act up to the time that he went to Europe recently. Michaelis is a partner in the firm, and holds the power of attorney of A. Beit.

When did you first obtain any knowledge of

the transactions, which will be referred to shortly, between E. Bruch and W. A. Lippert?—I think on the morning of the 16th April, 1889. The cable acquainting me of it is dated Cape Town, April 15, and was as follows: "Cousin Willie must have in any case £40,000, of which £16,000 without cover. Market declining. Please send instructions. Very serious. Fear criminal." That was the first intimation. In reply to that I sent a cablegram to Bruch on the 16th April, as follows: "We cannot assist you to any extent unless Willie can give satisfactory security." The same day Bruch cabled: "Advance £50,000 against 550 Robinsons, 800 Langlaagtes *cum* rights, 4,000 Bothas. Will act as you consider best. Further £25,000 odd required 20th April, otherwise criminal action cannot be avoided." On the same day Beit cabled to Bruch: "Strongly object your action, friend. What security can you offer against £25,000, 20th April? Do not act; await instructions." Counsel explained that "friend" meant Lippert. On the 17th April Bruch cabled to Beit: "Have obtained good security up to £10,000. Believe firm must go insolvent nevertheless. Family and you must find £25,000." On the same day Beit telegraphed to Bruch: "Telegraph total amount you have advanced friend. I do not approve action. Decline making advances of any kind. Do not believe Ludwig (meaning Mr. Ludwig Lippert, of Hamburg) can assist friend. Gold shares absolutely unsaleable at present." The same day Beit telegraphed to Breitmeyer, who managed the firm's diamond business at Kimberley, as follows: "Explain conduct E. Bruch advancing W. A. Lippert £50,000 without authority. Consider unheard of. Decline any advance gold shares." On the 18th Bruch cabled to Beit: "£25,000 forged bills due 10th July. Without assistance. £50,000 manage. It is quite impossible selling. No assets. Liabilities are heavy. Unless market improves past all hope." On that day Bruch again cabled to Beit: "Advanced £25,000 against 550 Robinsons, 3,000 Langlaagtes (*cum* rights), 4,000 Bothas, others £10,000 various. Leaving to-night." On the 18th April Lippert cabled to Beit: "Bruch explains. If it is possible, kindly keep quiet." These, said counsel, were all the cable messages.

Counsel then referred to the correspondence at great length, and read letters passing from the different parties. On April 16 Mr. Beit wrote to Mr. Bruch pointing out that he was unable to understand the latter's action in the Lippert affair, and that he had no right to make an advance without authority. Mr. Beit wrote that he would have given his personal security for £5,900 or even £10,000, but that £50,000 or £70,000 was out of the question. He was trying to sell the securities against the advance of £50,000, and if he came off

with a loss of £15,000 only he would be thankful Mr. Wernher also wrote to Mr. Bruch at the same time in similar terms, stating that Bruch's action was incomprehensible. Counsel then read a long letter from Bruch to Beit, in which the former gave an account of what he had done, and pointed out that a bill of £25,000 formed the *corpus delicti*, and that perhaps he (Mr. Beit) and Lippert's two brothers would take up the matter. Bruch added that Lippert had over-specified enormously, and that if the market did not recover he might burst at any moment, at the latest on July 10. He (Bruch) had only had one consideration before him, and that was to act as Mr. Beit would have acted in his place and tried to save the family. At the time when he consented to help Lippert, the latter gave him a balance-sheet shewing £25,000 to the good, but next day he found that that was not so, and that there was a heavy deficit. The next letter was from Bruch to Beit, and dated at Kimberley July 21, in which he said that in view of Mr. Beit's censure he insisted upon revealing the whole circumstances. The letter went on to say that Lippert had forged promissory notes, due July 10, for £24,900 and a guarantee for £5,000 by signing them "A. Beit *q.g.* E. Bruch." Desiring to save Lippert from the Breakwater he agreed to lend him £50,000 on security of £48,550 worth of shares, which would still leave £25,000 to be found on Lippert's behalf. Immediately the cheque was given he (Bruch) insisted on a full balance-sheet, and then he found that Lippert owed £500,000 and was £100,000 to the bad.

Mr. Justice Smith: Was Bruch any relation to Lippert?—Witness: No.

Did you think Bruch was carrying on business in gold shares at all?—I do not think to any amount.

Counsel then proceeded to read correspondence relative to the cable messages that had passed between the parties. On the 18th May Bruch wrote to Beit from Kimberley explaining what he had done respecting Lippert, and pointing out the possible effect of a cable to London stating that the Union Bank had failed. On the 30th May Beit wrote from London to Bruch, stating that Michaelis had his instructions with regard to Lippert's affairs, and adding, "I personally, cannot blame you, and hope that Lippert has been helped."

Examination continued by Sir T. Upington: The final result of this was that Michaelis came out with instructions. Bruch left my employ shortly afterwards, of his own accord. When Michaelis arrived in Cape Town he wrote stating that the manager of the Union Bank knew nothing of the forgeries. Lippert said his position must be kept up till the end of September. Michaelis added that he should be compelled to declare the

bills to be forgeries, that it was possible that the forgeries had been going on for a considerable time, and that Lippert had kept himself up by that means.

Mr. Justice Smith: Did you make any direct communication with the chairman of the Union Bank?—I made no communication whatever.

You left Michaelis to manage everything?—Yes.

Sir T. Upington: You had nothing further to do with the matter?—No, not until Lippert went to Europe.

Can you fix approximately the date that Lippert reached London?—The end of February or the beginning of March, 1890.

Had you heard then that he had become insolvent, and that the bank had collapsed?—I first heard that the bank collapsed on July 24, when I received a cable from Michaelis stating that there were rumours that the bank held paper purporting to have been endorsed by me. On the 24th July I cabled to Michaelis: "I have seen W. A. Lippert. He will admit in writing that they are forgeries to the extent of £151,000. You must inform Union Bank. Other banks foregoing. Bank must issue warrant."

Did you place the matter in the hands of the Scotland Yard authorities?—Yes. A detective was engaged, and I had Lippert watched for some time at the expense of my firm.

Were you approached by the Agent-General for the Colony?—We were approached by the Agent-General later, and were willing to render every possible assistance, but at that time Lippert had escaped.

Can you say how long Lippert was watched by you?—Five days.

Why did not you arrest him?—I took the advice of Mr. Poland, Q.C.

As a fact, Mr. Beit, you acted under Mr. Poland's advice?—Yes.

Have you examined these alleged signatures of Bruch's?—I have seen them.

The three drafts bear his genuine signature?—Yes.

Are the other forgeries?—They are.

Had you the slightest idea that there was anything besides the £24,900 and the £5,000 guarantee?—No, I had not.

Cross-examined by Mr. Searle: He got a letter from Michaelis, dated December 31, 1889, in which that gentleman said that he had honoured Lippert's drafts for £24,900. He replied to that on January 17, 1890, saying that he supposed that by that time Lippert was hopelessly lost, and that the £24,900 was to be debited to his private account.

Mr. Justice Buchanan: At the very time Lippert paid in this £24,900 he handed in a fresh guarantee for £104,000.

Witness said that when Lippert came to England in March or February, 1890, he saw him

once at his (witness's) rooms in London. He could not say for certain when Lippert left England, but a detective watched his house for some days. He was at his house, witness believed, nine days after he made his confession. Bruch had not paid part of witness's losses in his business. He offered to do so, but witness did not wish it.

By Mr. Justice Smith: Bruch was a man of medium means, probably £20,000 or so.

By Mr. Searle: There were no transactions between witness and Lippert personally. It was true that in the statement Bruch sent to England there was probably a guarantee of £5,000 purporting to bear witness's name referred to, but he took no steps to discover its nature, because as a fact he could not say that he really saw it. He knew that during 1889 the bank continued to do business with Lippert. He did not know the bank actually supported Lippert however. He did not wish the Court to be under the impression that Bruch was dismissed. He resigned for other reasons entirely, and had sent in his resignation when the Lippert business commenced. As a relative of Lippert's witness had desired to save him, and he appreciated Bruch's motives. It was not correct to say that his chief reason for objecting to Bruch's action was the insufficiency of the security. He objected to the whole business, but being in it he wished to know how he stood. At the present time, speaking from a business point of view, he was dissatisfied with Bruch's action, but he believed that Bruch was actuated by a desire to save the family of Lippert from disgrace.

Re-examined: He was not in the habit of giving promissory notes or bills of exchange, but only drafts on England against diamonds.

By Mr. Justice Smith: He did not communicate directly with the bank regarding the discoveries he had made as to Lippert. He did not write to the bank because he believed there was only one set of forgeries, that of which he knew, and he wished to save Lippert. He was, of course, ignorant that Lippert had committed other forgeries, besides those he had confessed. The £25,000 to save Lippert, the draft honoured by Michaelis was paid as to £12,500 by witness, and as to the remaining £12,500 by Lippert's own brother. He thought that then he had saved Lippert.

Gustav Hirsch, clerk in the employ of Mr. Beit, at Kimberley, swore that the name on a guarantee of £104,000 in favour of Lippert, purporting to be his, was a forgery. It was nothing like his signature. He had been with Mr. Beit since 1887.

SUPREME COURT.

MONDAY, FEBRUARY 22.

[Before Mr. Justice SMITH and Mr. Justice BUCHANAN.]

THE UNION BANK. V. BEIT.

The hearing of this case, in which Mr. Searle and Mr. Graham appeared for the plaintiffs, and Sir T. Upington, Q.C., Mr. R. Solomon, Q.C., and Mr. Schreiner, Q.C., for the defendant, was resumed.

Mr. Max Michaelis was examined by Mr. Solomon, Q.C., to the following effect:
Your name is Max Michaelis?—Yes.

You reside in London?—Yes.

And you are junior partner in the firm of Wernher, Beit & Co?—Yes.

You came to the Colony in June, 1882?—Yes.

And succeeded Mr. Bruch as Mr. Beit's agent?—Yes.

You have seen the documents sued upon?—Yes.

Purporting to bear your signature?—Yes.

Is that your signature on those documents?—No.

Do the blank forms put in bear your signature?—No.

Do the bills of December 24, 1889, addressed to the Union Bank, bear your signature?—No.

Have you ever made a promissory note in favour of W. A. Lippert?—Never.

For yourself or Mr. Beit?—Never.

Have you ever addressed a letter or other document to the Union Bank?—No.

When did you first become aware of the existence of the documents now sued on?—In July, 1890.

You mean you then heard of these notes for £13,500 and £11,400, and the guarantee for £104,000?—That is so.

When you came to Cape Town, which was directly after, you saw these documents, did you not?—Yes.

Did you know Bruch?—Yes, well.

Did you know his signature?—Yes.

Did the guarantee for £5,000 bear his true signature?—No.

As soon as you found out these large forgeries you cabled to Beit?—I did.

On the 4th July you telegraphed to E. Lippert stating that the business could be discussed at Johannesburg?—Yes. Correspondence took place between E. Lippert and myself with regard to the payment of his share of the £80,000. His portion was £16,000, and he gave £5,000 cash and promissory notes for £10,000.

No bills were presented to you in July?—No.

Witness then gave particulars of correspondence

which passed between himself and W. A. Lippert from Kimberley. On the 28th October, 1889, Lippert telegraphed that an unexpected opportunity had arisen for the taking up of the bills. If the bills could be done he (Lippert) would benefit to some extent. He telegraphed in reply that the bills must be presented where witness was. When he wrote to Lippert on the 31st October he was not aware that the bills for £24,900 had been renewed. Later he received a letter from Lippert in which were enclosed two bills the signatures to which had been torn out drawing on him for £24,900; he telegraphed that he could do nothing unless the missing portions were sent. Lippert replied it was impossible to find them, and after further telegraphic messages witness telegraphed on the 26th December: "Will pay to-morrow. Wishing you compliments of the season." On the 20th January he received a letter from Lippert intimating that he was proceeding to Europe on the 5th February on business, and would be absent several months. Capelle held his power of attorney, but he knew nothing of the bills for £24,900.

Mr. Justice Buchanan: In one of his letters Lippert speaks to you of requiring £25,000. What was that?—It was the £24,900 we agreed to pay. He always referred to it as £25,000.

Mr. Solomon: The declaration states that you knew of the agreement between Lippert and the Union Bank in 1889. Is that so?—No, I did not.

You knew nothing whatever about it?—Nothing whatsoever.

And you never agreed to advance £25,000 more than for the forged bills you knew of?—Exactly.

You have never seen the forged guarantee for £5,000?—Never, before the case commenced.

When you saw the forgeries at the Standard Bank in 1890 you made an affidavit for Lippert's arrest?—Yes, I made several.

At whose request?—I was legally advised to make them.

Who was Mr. Breitmeyer?—He was in the office in Kimberley.

Managing the business with Bruch?—One branch of it.

Cross-examined by Mr. Searle: He saw Lippert on his arrival on the 20th June, and on the 22nd June he cabled to Beit that the bank had no knowledge of Lippert's defalcations. When he wrote that the forgeries had been going on for some considerable time that was the drift of his mind, but he dismissed this conclusion from his mind after conversation with Lippert. He did not communicate with Beit on the subject until the end of the year, and in the meantime he paid the bills.

Mr. Justice Buchanan: Between June and December did you write to Beit?—Only those letters put in.

Cross-examination continued: He knew on the 10th July that the bills had not been presented, because on the 20th June Lippert said they would not be presented. The reason he wrote to Lippert stating that if Lippert could find £10,000 cash he could command the remaining £20,000 was that he was anxious that the bills should be retired and not held over.

Mr. Justice Smith: You must have known, as a man of business, that the bank would not keep these bills with Beit's name on them unless they were renewed.—Witness: I had seen a statement that the bank held over his whole position.

Cross-examination continued: He knew in June that there were two forged bills in the Standard Bank; but he did not say that it was probable there were other forgeries in existence. That was the drift of his mind at the time. In the ordinary course he would have received the cheques from the Standard Bank, and in the ordinary course he would receive from the Standard Bank notice that bills were lying there with his name on. That would be when the bills became due. The Standard Bank, however, never intimated to him that they had these bills. The Standard Bank at Kimberley had his signature, and also those of Beit and Bruch. He did not know whether the signatures were held in Cape Town. He knew that Lippert could not recover his position in the middle of 1889. Lippert was then quite hopeless. He did not know that the Union Bank was solely supporting Lippert after April. He did not know that the bank had taken over Lippert's liabilities. Lippert did not tell him so; all that he said was that both banks would hold over his liabilities till the end of the year. He meant to say that he never read the correspondence between Lippert and Bruch. The correspondence might have been at Kimberley, but he did not read it. He had heard something about a new arrangement and he knew that until Lippert paid the £25,000, on the forged bills Beit agreed to take up, the bank would do nothing. He did not pay the £25,000 because unless it was paid the bank would make no new arrangement; but he paid it because he wished to save Lippert, and he swore he did not know that Lippert, at the time he received the £25,000 from witness, had just renewed bills to a similar amount. It was hardly likely that he (witness) would have taken up the £25,000 worth of bills if he had not believed Lippert that those were the only forgeries he had committed.

By Mr. Justice Smith: He did not go to the bank and see what paper purporting to be Beit's was in existence because he wished to save Lippert, and was afraid that, if he went to the bank, suspicion might have been directed and Lippert discovered.

By Mr. Searle: Lippert was under great

emotion, and swore by all he held sacred that the only bills he ever forged were those for £24,900, which Lippert always referred to as £25,000, and the guarantee for £5,000, and witness believed him, else he would never have helped him at all. It was not correct to say that so far as Lippert's safety went there would have been no harm in going to the bank. There would have been all the harm possible. It was not true to say that the reason why he did not go to the bank was because that he was afraid of what he might hear there. If that were so, why should he have paid the £24,900? Edward Lippert paid half of the £24,900, and half of the forged guarantee for £5,000, or £12,450 in all, and Beit paid a similar amount in order that Lippert might be saved. He wished to save Lippert, but it was not correct to say that he did not care what became of the bank. He thought that when he had paid the £24,900 and the £5,000 the bank was in no way in danger. The bills he paid came not from the bank, but from Lippert's possession. He absolutely denied all knowledge of any other guarantee than that for £5,000. He had not time to go into the whole affair with Bruch. He was only in Bruch's company eight or ten days, and Bruch then left, and during those eight days witness had to take over the whole of Mr. Beit's business in Kimberley from Bruch, as well as this private affair of Lippert's. The first he had heard of the Union Bank holding paper purporting to have been signed by witness, *q. q.* Beit, was from Mr. Cecil Rhodes. This information was supplemented by Mr. W. H. Craven, who had heard rumours in Cape Town, and informed Mr. Rhodes. Immediately Craven returned to Kimberley, witness cabled to Beit. He also telegraphed to the Union Bank as follows: "I have received private information that you are in receipt of paper purporting to be signed by me, *q. q.* Beit. If so, this is a forgery." That day he received a telegram stating that the manager would see him personally, and Hall arrived in Kimberley in the course of a few days. Hall said that witness had taken up bills of that description before, but witness denied it.

Mr. Ludwig Breitmeyer (examined by Sir Thomas Upington) said that he was in the Kimberley office of Mr. Beit and remembered Bruch leaving for Cape Town in April, 1889, but he left for a holiday. Bruch had no large transactions with Lippert. When Mr. Bruch made the advance of £50,000 to Lippert he wired witness about it the same day, and shortly afterwards witness also received a cable from Beit asking him to explain Bruch's conduct in making such an advance. At that time witness had absolutely no knowledge of the alleged transactions between Lippert and Beit. He knew Lippert did business in a general way,

but that was all. Witness knew of the forged bills for £13,500 and £11,400 and the £5,000 guarantee, but until the collapse of the Union Bank and the exposure of the whole thing to the world, he had no knowledge whatever of the forgeries now in question.

By Mr. Searle: He was engaged in Mr. Beit's Kimberley business, but that grew so largely that eventually it was divided, and he looked after the diamond branch and Bruch the shares.

On the 24th February Mr. Ross gave the following evidence on commission:—John Robert Ross, sworn, states: I was one of the directors of the Union Bank at the date of its stoppage, and had been so for some years previous. I was Chairman of the Board of Directors in 1889 and up to the time of the stoppage of the bank. The Union Bank had considerable transactions with W. A. Lippert in 1888, 1889, and 1890. Before April, 1889, bills were discounted on the bank bearing Beit's name. These bills would not be handed to me. All bills would come before the Board at one of the weekly meetings. I knew Beit slightly. I met him in the Transvaal. This was before April, 1889. I knew him as a man having the reputation of having considerable means. In April, 1889, it came to the knowledge of the directors that certain unauthorised advances had been made by Hall to Lippert. This matter came before the Board. The minute of 18th April is correct. It is signed by me. This was a special meeting. I entered then into negotiations with the Standard Bank; they were conducted almost entirely by myself. After 18th April the directors took the matter into their own hands. No more unauthorised advances were made by Hall. Lippert offered a certain guarantee to that date. I had frequent interviews with Harsant.

Question. Did you at that date consult Mr. Harsant, of the Standard Bank, as to Beit's position?—I did. He told me (Sir T. Upington, Q.C., objects to conversation between Harsant and witness.) (Answer subject to objection.) Harsant said, "Give us Beit's name; it is as good as sovereigns." On 28th April a guarantee attached to a bill for £110,000 was handed by us to Lippert. It was at this time I consulted Harsant. It was acting on Harsant's advice that made us get this guarantee. I reported to a special meeting held on 24th April. It appears from the minute of that date. About 23rd April it was arranged that we should take over all Lippert's liabilities to Standard Bank. I cannot very clearly remember the dates. It must have been between April 18 and 24. The bill for £110,000 was an eight months' bill. In December 1889, Lippert made certain proposals to the bank. I drew up a memorandum. Hall also drew up a memorandum. The Board concluded an agree-

ment on the basis of this memorandum. There were then two bills £13,500 and £11,400, (each) amounting to £24,900. This was in December, 1889. The two bills fell due about Christmas. These two bills amounting to £24,900 are, I think, the bills referred to in the memo. as £25,000. Beit was to pay £25,000. There were two bills which made in round numbers £25,000; they were drawn through the Standard Bank on Beit. There was some delay and anxiety and telegraphing in consequence of their not being promptly paid, but eventually Michaelis paid those two bills and it relieved us. That was one of the agreements on which the arrangement was made with Lippert that he should pay £25,000 before the end of the year. These were the two bills which Michaelis paid, and which he afterwards refused all information about at the meeting at the Standard Bank. On 30th December, Hall wrote to Lippert (No. 26). This letter must, I suppose, embody the new arrangement with Lippert. This letter was authorised by the Board. I cannot remember the details, but I remember the general arrangement. At this date a promissory note for £104,085 2s. 6d. was taken by the bank with Beit's suretyship endorsed thereon. This arrangement would not have been entered into unless Michaelis had paid the £25,000. I first heard that the promissory notes and the guarantee were alleged to be forgeries in the end of July. The telegram from Michaelis of 26th July was the first I heard of it. I had always considered these notes and guarantees genuine. I sent Hall to Kimberley at once to see Michaelis. I consulted with Karp and we sent a telegram despatching the manager at once. I saw Michaelis about the end of July, a day or two before the bank closed. I am now not so sure it was before, I rather think after the bank stopped. I saw Michaelis in the Standard Bank, Cape Town. We shewed Michaelis certain bills, promissory notes signed "A. Beit—Michaelis," which he declared were forgeries. Michaelis asked me whether we would arrest Lippert on these forgeries. I said, "Most certainly not. I do not admit them to be forgeries for a moment." He said he had never had any business transactions with Lippert. I asked how it was he paid this £25,000 and would he explain that. He said that had nothing to do with the question at issue and declined to give me any information about the £25,000. The letter of 26th July, Lippert to me (No. 18), I received about the middle of August. I went at once to see Steytler and Gibson. The next morning I handed it to Steytler. Generally speaking, after April, 1889, and during 1890, the Board of Directors had management of all dealings with Lippert. In making advances to Lippert upon unsecured bills we relied on Beit's name. There was one such bill for £58,000. We would not

have allowed these advances to Lippert without Beit's name. It was Beit's name we went on. The facilities given to Lippert were on Beit's security, and the shares of course. This refers to bills with no securities attached. With regard to unsecured bills with Beit's name on the advances were made on Beit's name. I remember especially one bill for £58,000 with no security attached. I am recovering from a severe attack of influenza, and I am not as strong as I usually am. I came out this morning for the first time.

CROSS-EXAMINED BY SIR T. UPINGTON, Q.O.

The active person in the management of the bank was the cashier and general manager. I was only one of directors. After April, 1889, I had conduct of special business affairs connected with Lippert. I was a director for seven or eight years. The course of business was this; the discount book was brought before the directors by Hall. In this book all applications for discount were entered. The bills were put before the Chairman for the time being; before the Board really, and then they decided by a majority whether they would pass them or not. All Lippert's transactions, whether bearing Beit's name or not could not have come before the Board.

Why?—"God knows why, you must ask Mr. Hall."

There was a half-yearly inspection of our securities. Two of the directors made it. I took my turn. I don't think I took more than my turn. There was an audit of the accounts of the bank every half-year in the same way. That is the half-yearly general statement. This was made by directors. There were no outside auditors.

Q. Can you account under any circumstances whatever for an unauthorised advance by Hall to Lippert of upwards of £150,000 while there was a Board of Directors of the Union Bank actively engaged in its management? A. In the first place the Board did not actively engage in the management; they are not clerks or managers. The Board simply come twice a week, and at those meetings a statement of affairs of the bank up to that hour are placed before them. The minutes are first read, statement of affairs of bank is read, general business discussed and managed, discounts passed, exchanges arranged, general business in fact. Mr. Hall as executive manager had almost supreme control in the general management—but he exceeded his powers; he broke his orders; he had no business ever to do what he did.

Q. As a mercantile man in a mercantile business where your business is controlled by a general manager, would it have been possible, if you had exercised reasonable supervision over your general manager, for him to have done what Hall did? A. This is a regular conundrum.

First of all, there is no parallel between my business and such a business as a bank business. But if the object of the question is to know whether a manager on whom I place implicit trust can exceed his powers, of course he can do so.

Do I understand you to say that in your mercantile business you would exercise closer supervision over your employes, your books and documents, than you would as a director of a bank?—This is another conundrum. Naturally I look over my own household and business more closely than I do over a bank where I only go half an hour twice a week. Before 1889 the other directors were very good men of business. Before 1889 I had no transaction with Union Bank. Personally I had no share transactions with the Union Bank until shortly before its stoppage, at least of any magnitude.

Q. Before April, 1889, had other directors to your knowledge large share transactions with the Union Bank by way of discount or advances? (Mr. Searle objects to this as irrelevant).—A. Most of directors had business relations with bank in connection with discount and advances. One director only had large transactions in connection with shares. Lippert was never a director.

Can you give any reasonable explanation why directors kept Hall on after April, 1889?—Yes, the explanation is the Board discussed whether they should dismiss Hall summarily, but Hall showed such contrition and such anxiety to assist the bank through its troubles that we decided to keep him on, more especially as after full consideration we felt satisfied that, however wrongly Hall had behaved, his intentions at all events were *bona fide*. He did not intend to act dishonourably. As a matter of fact, the liquidators continued Mr. Hall's services some fifteen months after the stoppage of the Bank.

Q. When you discovered that Hall had made such enormously large unauthorised advances to Lippert, did you not have some suspicion and make some inquiry as to Beit's account?—A. I never had the slightest suspicion. I thought Beit and Lippert were partners in a way; that is, that they were speculating together. Lippert told me almost as much. That Beit was his cousin; that he would do anything for him; that Beit had been under great obligations to him. On 18th April the affairs of the bank were not so very bad. The bank was as right as could be until this smash of Lippert's, and all this came together. I had no suspicion, as far as I remember in April, 1889, that bank was in an unsound condition. —But what do you call unsound?—If there had been a boom the shares of the bank would have gone up.

Q. What, then, is your explanation of your minute in the secrecy bond minute book of 18th

April, 1889?—A. The cashier had placed us in a difficulty; we had to pay £160,00 he had advanced without authority. The secrecy bond minute book was kept so that none of the clerks might know what was going on; they had access to ordinary minute book. A shareholder would not have been given access to the secrecy bond minute book. A shareholder would not have the right of access even to the ordinary minute book. On 18th April, 1889, I do not remember that we referred to our deed of settlement. We must have referred to it at times.

Q. Did you ever attempt to ascertain whether the losses of the bank at any time had brought it within the provisions of 50th section of deed of settlement?—My impression is we did discuss this very clause and never found ourselves in that position. We could not ascertain our losses. I could not put my hand on any minute showing that this had been discussed. After 18th April, 1889, the bank drew its horns in considerably, and did not make considerable advances on shares to Lippert or to any one else. Our funds were all employed in lending money to Tom, Dick, and Harry in banking business including shares, of which a very considerable amount would be advanced against shares. I had a great belief in Lippert personally. I thought he was an honest man and a gentleman. I had rather not say what I think now. By the memorandum Beit was to "pay in" £25,000. By that we meant that Lippert was to get certain facilities and was to reduce his account by £25,000 which Beit was to pay. With regard to the two bills amounting to £34,900 they were not paid at the due date. We telegraphed through the Standard Bank to its branch at Kimberley. The bills were handed by Hall to Standard Bank here for collection at Kimberley. Anyhow, they were in the hands of the Standard Bank. The Standard Bank presented them to Michaelis, I did not know they got back into Lippert's hands. This is the first time I have heard it. I have no theory about the renewals of the bills for £18,500 and £11,400. I cannot refer to any minute showing the sanction of the directors to the agreement embodied in letter of 30th December, 1889. Such a minute I think ought to be in the ordinary minute book. Being a business matter it ought to be in ordinary minute book. I can fix no date to the memo. in my handwriting already put in. I cannot say it was in December. I cannot fix my mind at all. I made a statement at a special meeting of shareholders on 31st July, 1890. The reports are pretty accurate in both papers. (*Cape Times*, 1st August, 1890, put in—C. 1.) The bank made no attempt at any time to secure Lippert's arrest. At the time I saw Michaelis I said, "You go and arrest him if he has forged your name. We do not admit it is a forgery."

Do you think the signatures are forgeries now? —I don't know. If some of them are forgeries they are good imitations. Michaelis wrote his signature, and I said, These are uncommonly like yours. By "these" I meant the bills then in the Standard Bank. I was deputed to interview Lippert by the bank more than once. He showed me he was worth about £150,000, and exhibited his securities. This was previous to the discovery of Hall's action on 18th April, 1889. After discovery I never saw his scrip again. We were always pressing him to reduce his debt. There was a written agreement between the Union and Standard Bank. A guarantee was given them securing them for such advances as they might make to us generally. This or a copy must be among papers of the Union Bank. There must be reference to it in the minutes also. The Union Bank never made any communication with regard to Lippert's account to Beit or any one of his agents.

Re-examined: Mr. Searle undertakes to put in a certified copy of such an agreement as that mentioned by witness between Union and Standard Bank if such document exists.

By Mr. Searle: Hall in my opinion worked well and loyally for bank up to time of its stoppage. He was a good servant all round, but self-sufficient, and thought he knew more than we did. Hall worked zealously and well with directors; he did his best, we could not have got a better manager in many ways. We had no reason to regret we did not part with Hall in 1889. The other transactions with Lippert after April, 1889, were mainly conducted by myself with approval of directors. The discount book will show all bills that were laid before the Board. (Book put in, C. 2.) I do not know actual details of what occurred in December with regard to £18,500 and £11,400 bills. I do not know whether they actually were presented or not. I know the money was paid. I have never looked at the books or spoken to liquidators about them. After April, 1889, there was a transaction with Bank of Africa in March, 1890, by which we took over certain liabilities of Lippert. If we had known in December that these were forgeries we would certainly have not taken over Lippert's liabilities in March, 1890. I cannot say whether there is a minute or not about the transaction of end of December, 1889. I am quite sure it was entered into. I had main conduct of it, with the knowledge of the Board. This is the transaction on which Lippert signed the £104,000 bill with Beit's surety for whole amount.

Postea (March 8rd).

Mr. Searle put in a guarantee given by the Union Bank to the Standard Bank for repayment of moneys advanced either to the Bank or to Lippert.

Counsel then proceeded to review the facts of the case, and asked for judgment for the amount of the claim, £168,785. One of the counts of the declaration alleged that the promissory notes sued upon were actually signed by Max Michaelis as the agent of Beit; a further count stated that in case the Court should decide that the notes were not actually signed by Michaelis for Beit yet there were certain transactions between the Bank and Lippert of which Beit, through Bruch and Michaelis, had full knowledge.

The Chief Justice remarked that the dates of the declaration were very misleading and complicated.

Mr. Searle admitted that the declaration was in some particulars vague, and in consequence amendments had been made.

The Chief Justice hoped the declaration would now be intelligible. But on what ground did the plaintiffs claim supposing these notes were not forgeries? There was no claim for damages for misrepresentation and no claim for relief.

Mr. Searle replied that the plaintiffs sued upon the promissory notes, and also claimed for other relief. He would, with the permission of the Court, amend the declaration so as to make it as wide as possible. All the facts were before the Court.

The Chief Justice observed that Mr. Searle would submit his amendment to counsel for the other side before presenting it to the Court.

Mr. Searle then proceeded to review the evidence given in the case, during which, referring to Bruch's dealings with Lippert, he said that when in Lippert's company Bruch received a letter from the manager of the Standard Bank asking him to go across, Lippert turned as white as chalk and confessed his crime.

The Chief Justice asked why under these circumstances the manager of the bank was not called. The manager possibly had some reason for sending for Bruch.

Mr. Searle was quite content that the manager should be called. He had not called him for the very reason that he declined to give the liquidators of the Union Bank any information. It was a little dangerous to put a witness in the box who declined to make a statement beforehand.

The Chief Justice asked what was the real nature of Mr. Searle's contention, was it that inasmuch as Beit recognised these two forged notes he was bound to pay any other notes afterwards forged in his name, inasmuch as there was a guarantee or representation that notes so signed would be met by him; or was it that there was a representation of Beit to the bank that these notes at all events were his, and that Beit therefore would be liable in damages for any loss sustained by the bank in consequence of such misrepresentation. These

were views altogether distinct. He could well understand the latter position that if the bank lost anything, and either made fresh advances or entered into an agreement with the Standard Bank, or was prevented from recovering money from Lippert, which it would otherwise have recovered. There was a great deal, of course, in the contention, but had they facts before them to show what the loss so resulting was? Was it distinct upon the declaration that this was the ground of action?

Mr. Searle said it was certainly analogous to a case tried in Scotland, and which subsequently came before the House of Lords, where a man knew that a certain promissory note lay in the bank bearing his forged signature. The man took no steps, but actually allowed the forger to put in another bill, and even then took no steps. The Court of Sessions held that it was the duty of the man whose name was forged to disclose the facts as soon as they came to his knowledge. The House of Lords held that there was no absolute duty upon a man unless the bank could show that some prejudice had resulted to them, but if the bank could show that there was some prejudice to them, the man was liable for the bill.

The Chief Justice said he did not think the House of Lords laid down that at all. Of course there were dicta which might be so construed, but no further than that the bank could recover so much as they had actually lost by being misled by misrepresentation.

Proceeding, Mr. Searle held that Beit could not plead innocence or bardship, because he knew that Lippert had forged his signature, and had, in fact, honoured this forged paper. Michaelis's evidence was in some respects unsatisfactory, and he submitted that Michaelis, if not actually aware that there was a lot of forged paper in the bank, must have had the gravest suspicion, and it was his duty to communicate the same to the bank. Colour was lent to this by Michaelis's letter to Beit, in which he stated that Lippert must have had enormous accommodation from the bank. If Michaelis had on the 10th July taken up the two bills which he knew to be forged he would have saved Lippert; but as a matter of fact Michaelis refused to touch the forged paper in Cape Town. There could be no doubt from the correspondence that Michaelis was afraid that some general statement of Lippert's liabilities and assets would be made.

The Chief Justice: He thought the cat would be let out of the bag. He so acted in order to prevent certain other bills being met. In that way the evil day might be postponed.

Mr. Searle, proceeding to further analysis of Michaelis's evidence, urged that by his silence in respect of papers which he knew to be forged he had misled the bank.

The Chief Justice : You would imply that Lippert was entitled to sign on behalf of Beit. If this were so, you would succeed upon every point. What you contend is that the conduct of Beit's agents in hushing up this matter—an arrangement by which Lippert was assisted further—amounted to representations to the bank that these two notes were genuine.

Mr. Searle : Yes ; practically to a ratification.

The Chief Justice : And that Lippert was justified in signing the two notes on behalf of Beit ?

Mr. Searle : That, at all events, the bank are entitled to say that they could not dispute the authority of Lippert to sign for Beit. Continuing, Mr. Searle said on the 15th April, 1889, had the bank known of the forgeries they could have recovered £190,000, whereas all that the bank had received from the estate of Lippert amounted to £245 in dividend. This was given in evidence by Mr. Steytler.

The Court then adjourned for lunch.

On resuming, Mr. Searle said he had prepared a draft of an amendment, making an alternative claim. In this amendment it was stated that by the conduct of the defendant the plaintiffs alleged that the defendant represented to the Union Bank, on or about April 15, 1889, and thereafter throughout the year, and up to the 25th July, 1890, that the promissory notes for £104,085, £58,800, and £11,400, and those referred to in certain counts of the declaration, of which the above were renewals, were genuine, either as being signed by Bruch or Michaelis in his behalf, or by Lippert on defendant's authority. In consequence of this misrepresentation the plaintiffs had sustained damages amounting to £168,835 through advances made to Lippert after April 15, 1889.

The Chief Justice thought it was chiefly through not having recovered certain assets that they might have claimed.

Mr. Searle observed that that might be covered by this in not giving further time to Lippert whereby they could not recover, as otherwise they might have.

Sir Thomas Upington objected to the amendment being allowed ; it was most inconvenient.

The Chief Justice said if no injustice were done to the defendant and if no fresh evidence were given, it was the practice of the Court to allow an amendment at any stage of the case.

Sir T. Upington agreed, always supposing that the amendment was a plain and simple one ; but the suggested amendment raised fresh issues and he must object to it. Counsel referred to the case of "Tait v. Wight" (7 Juta, p. 158).

Mr. Searle urged that unless this were allowed the whole case would have to be begun *de novo*.

The Court, after further consultation, disallowed the amendment. The Court expressed surprise

that neither side had examined Mr. Harant, manager of the Standard Bank. It was not for the Court to determine if the parties themselves did not wish it.

Mr. Searle, continuing his argument, referred to the case of "Barber v. Gingell" (3, *Epinasse*, p. 60), which he discussed at length. Counsel also referred to the following authorities : "Morris v. Bethell" (5, *L.R.C.P.*, 47), "McKenzie v. The British Linen Company" (6, *L.R.A.C.*, 82), "Faure v. Louw" (1, *Juta*, 8), *Bytes on Bills* (p. 39, p. 270), *Chitty on Bills* (p. 18, p. 414), *Bell's Commentaries* (vol. 1, p. 815), *Everest and Strode on Estoppel* (p. 277 and pp. 288-289), *Broom's Legal Maxims* (888-885), "Pickard v. Sears" (6, *A. and E.*, 469), "Gregg v. Wells" (10, *A. and E.*, 90), "Freeman v. Cook" (2, *Ex.*, 654), "Knights v. Wiffen" (*L.R.*, 5, *Q.B.*, 660), and *Cababe on Estoppel* (pp. 78-80). In conclusion, counsel contended that plaintiffs were entitled, in terms of the declaration, for judgment for the amount, because they had clearly shown that, by having been misled, the bank had sustained damage to that amount.

SUPREME COURT.

FRIDAY, MARCH 4.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH and Mr. Justice BUCHANAN.]

THE UNION BANK. V. BEIT.

Sir T. Upington, opening the argument for the defendant, said that the action was based solely upon contract. The first count of the declaration was framed upon the liability arising out of certain promissory notes alleged to have been signed by the defendant ; the second count rested also upon contract, an alleged liability on the part of the defendant, and this must be dealt with as being a question of contract between the bank and the defendant. Counsel then proceeded to draw attention to the transactions which took place between the parties with a view to find out how any obligation placed by the contract affecting the defendant could possibly arise. In the letter of the 17th April, 1889, written by Bruch to Beit, in which this transaction was first of all discussed, it was shown what the nature of the transaction was. It was a purely business transaction as far as the £80,841 was concerned. An advance was made by Bruch to Lippert against certain securities. Bruch

never undertook any liability in respect of the forged notes. This the correspondence clearly showed. Coming to Michaelis's connection with the business counsel admitted that Michaelis came to this country with full power to deal with the matter. In an early letter Michaelis declared that he had no knowledge of any forged bills save those of £11,400 and £18,500. His learned friend (Mr. Searle) intended to convey the impression that Michaelis presumed that these two bills were the outcome of previous forgeries by Lippert. But surely if Michaelis had known this, he would have been insane to pay two forged bills and leave others in the bank.

The Chief Justice: I suppose if Beit had said to the bank, either by word of mouth or letter, that Lippert had his (Beit's) authority to sign and had said nothing more than that, the bank would have been justified after that in accepting these forged documents, would it not?

Sir T. Upington: If he had given authority?

The Chief Justice: No; if he had simply repeated by word of mouth, "Lippert has my authority to sign bills for me, to use my name," then I suppose there can be no doubt that the bank would have been justified in accepting the forged bills?

Sir T. Upington: Providing that the agent so appointed acted within the scope of his authority.

The Chief Justice: Then I suppose you will agree that it is a jury question whether the conduct of Beit amounts to such a representation? If that is the question, and the case were being tried by a jury, the Court would certainly not withdraw it from the jury.

Sir T. Upington: I think not.

The Chief Justice: Then it is simply a question whether the conduct of Beit was such as to justify the bank in coming to the conclusion that it amounted to a representation that Lippert had the authority of Beit to use his name.

Sir T. Upington: I think there will be a great deal more than that. The first issue which would be put to the jury would be: Was Lippert held out as Beit's agent at all? That will be the first and vital issue. If so, had he authority from Beit to enter into this specific transaction? That would be the second issue.

The Chief Justice: But supposing, upon the fact before the Court—would the Court be justified in withdrawing the case from the jury?

Sir T. Upington: I submit there is no question to go before a jury.

The Chief Justice: I put myself in the place of the bank, which has a guarantee not withdrawn Beit knows it is forged, and the bank has an opportunity of referring to the document, assuming it is genuine. Then there are two forged notes left in the possession of the bank, and which the bank has an opportunity of

referring to. After that they are paid, and the bank assumes that the person paying them recognises them as genuine bills. Does not this justify the bank in assuming that similar bills are genuine as being authorised by Beit?

Sir T. Upington: The question as to whether Lippert was the agent of Beit to enter into these transactions is not this action at all.

The Chief Justice: Had not Lippert an implied authority from the previous course of dealing between the parties to enter into a similar transaction which had been recognised before in Faure against Louw?

Sir T. Upington: No. In that case the initial agency was clear and conclusive. There is this additional difficulty; if I remember aright, the bills were signed by the son purporting to be the agent after his agency had been revoked.

The Chief Justice: That was not a case of forgery, but the principle would be the same.

Sir T. Upington: I submit not.

Mr. Justice Smith: Scarcely so, because they might have referred to Bruch and Michaelis.

The Chief Justice: The case of Faure against Louw was even stronger, because the father was in Cape Town.

Sir T. Upington: I distinctly say as a legal principle no, distinctly no. What right has the bank because a forged bill has been paid to take half a million of money as promissory notes?

The Chief Justice: Supposing it had been a small amount. Because a large amount is concerned the mind is apt to be aghast.

Mr. Justice Buchanan: Up to the end of December the utmost that can be said against Beit is that he was liable, but after the payment of December 28, is it not to be implied that Lippert had the authority of Beit to sign for him?

The Chief Justice: And would not the payment encourage Lippert to continue his forgeries? I do not look at these two solitary bills. I look at the whole transaction, at the guarantee being left with the bank, and the knowledge of the manner in which Lippert was involved at the time.

Sir T. Upington: I shall be prepared to urge that even in such circumstances there is no legal liability whatever upon Beit.

The Chief Justice: Would a jury conclude there was authority to use his name?

Sir T. Upington: If I were putting the matter before a jury I should submit that this was very slight authority indeed.

The Chief Justice: Still, I should not withdraw the point from the jury.

Sir T. Upington: If the question were left to a jury, and if the jury found on that evidence alone that there was authority given to discount further bills for Beit, it would not stand in law for a moment.

Mr. Justice Smith : I draw a great distinction between bills drawn after December, 1889, and those drawn before.

The Chief Justice : I am speaking of those drawn after. The guarantee was placed in the bank after the two forged bills had been paid.

Sir T. Upington submitted that this was an entirely new issue, and was not raised on the pleadings. There was, moreover, nothing in the examination-in-chief or in cross-examination to imply that Lippert was assumed to be the agent of Beit. His client was at present on his way to England, and he could not allow any amendment without consulting his learned colleagues.

The Chief Justice, after brief consultation, said : We think at this stage that we ought to allow the amendment, and if Sir Thos. Upington can assure the Court that further evidence will be required to meet it, he will be allowed to call it ; but if Mr. Searle asks for an amendment to the effect that the defendant led the bank into the belief that Lippert had his full authority, I should see no objection.

Mr. Searle then formally applied for the amendment of the declaration.

The Chief Justice said the Court had decided to allow it.

Sir T. Upington objected, but

The Chief Justice assured counsel that he would be allowed to call any further evidence bearing upon the point.

The amendment was to substitute "led" for "mailed" and "authorised" for "adopted." The effect of this was to raise the general question of Lippert's agency for Beit instead of limiting it to Beit's ratification and adoption of the documents now sued upon.

Sir T. Upington asked the Court to take note of his objection.

The Chief Justice said the Court would do so, and also of the point that the Court would allow counsel to call further evidence.

Continuing his argument, counsel referred to the following authorities : "Davis v. The Governor and Company of the Bank of England" (2 Bingham, 898), "Brook v. Hook" (L.R. 6, Ex. 89), "Morris v. Bethell" (L.R. 5, C.P., 47), "McKenzie v. The British Linen Company" (L.R. 6 A.C., 82), "Faure v. Louw" (1 Juta, 3), "Barendale v. Bennett" (3 Q.B.D., 526), "The Bank of England v. Vagliano Bros." (H. of L. Cases, 1891, p. 107), and Evans on Principal and Agent (p. 71).

Mr. Justice Smith : The point upon which I lay stress is whether the bank acted with due discretion.

Sir T. Upington : That would be disclosed by further evidence from the directors as to their mode of dealing.

The Court then adjourned for luncheon.

After luncheon

Sir T. Upington said he had consulted with his learned friends (Mr. Solomon and Mr. Schreiner) as to the course they should pursue with regard to producing further evidence, as their client (Mr. Beit) was now at sea on his way to England, and also Mr. Michaelis. As these gentlemen would really be the witnesses whose evidence would be of the greatest importance in connection with any allegation which was made as to the authority, and as they could not possibly produce them until a very considerable time had elapsed, they had taken upon themselves—he hoped they were right in doing so—the responsibility of proceeding with the case on the evidence as it stood. Proceeding, Sir T. Upington said before the Court adjourned for luncheon the question was raised as to whether the action of Michaelis as representing Beit in paying these forged notes, and in allowing what he knew to be a forged guarantee to remain, amounted to such a representation to the bank that Lippert had authority to have the enormous dealings which he had with them. Counsel then proceeded to refer to the case of Faure against Louw, and to note the distinction between that case and the present. Counsel drew the attention of the Court to two minutes of the secret meetings of the Board of Directors, the first was to the following effect :

"Special Meeting.—Thursday, April 18, 1889.—Present: Mr. Ross, chairman; Messrs. Overbeek, Vos, Webster, and Moller.—The cashier stated that he had called this special meeting in order to inform the Board that he had advanced Messrs. W. A. Lippert & Co. a sum of about £160,000 on his own responsibility, and without the knowledge or sanction of the Board, and that Messrs. Lippert & Co. required still further assistance to the extent of about £87,600. It also transpired that the cashier had issued letters of credit in favour of Lippert & Co. to the amount of £30,000, for which the bank was responsible, forming portion of above-mentioned £160,000, and that the issue of these letters of credit was also withheld from the knowledge of the Board by the cashier. The Board severely reprimanded the cashier for his conduct. He admitted his culpability, and offered to tender his immediate resignation, which the Board, however, could not accede to. After full discussion and deliberation it was the unanimous opinion of the Board that the best course open to them was to accept the position, and it was resolved that the chairman negotiate with the Standard Bank with the object of obtaining a loan from that institution to tide the Union Bank over the difficulty in which the cashier had placed it.—J. K. ROSS, chairman."

The other minute had reference to the chairman of the Union Bank giving a guarantee to the Standard Bank.

Sir T. Upington said his first contention was that under no circumstances whatever was Lippert ever the agent of Beit, through Bruch or through Michaelis, to do any act which would bind Beit; that it was clear from the evidence that the dealings between Beit and Lippert were of a very insignificant description. The bank knew in December that Beit would pay these bills. That was no justification whatever for the bank contending that Beit was to be liable upon every forged endorsement in the possession of the bank. Was the dealing with the forged guarantee for £5,000, which was alleged to have been taken for a cover of £65,000, to be held to bind Beit to this, that he held out to the bank that Lippert had authority from him to deal with every bill which came in with the signature "A. Beit, p.p. Max Michaelis," whether written by Michaelis or not.

The Chief Justice: The point against Michaelis is this, that he knows that this guarantee is fully covered by the shares, so that he is content to leave that in the bank knowing that they will not be liable, but regardless of the effect which this signature may have upon the bank with regard to future bills.

Sir T. Upington: There is no evidence to show that the signature to the £5,000 guarantee had any effect upon the bank.

The Chief Justice: This was never repudiated in any way. Would not that give them additional reason for accepting other bills signed by Lippert on behalf of Beit?

In conclusion, Sir T. Upington urged as the possible strongest point in his client's favour, the fact that the bank never gave Beit notice when they accepted the forged guarantee for £104,000.

Mr. Searle then replied on the case and referred to *Cornish v. Abington* (4 H. and N., 549) and *Piggott v. Stratton* (1 De G., F. and J., 88).

Cur ad vult.

Postea (March 8.)

The Chief Justice said the Court had decided to deliver judgment on the 12th inst. Meanwhile there were one or two matters which he should like to clear up. The first was with regard to the £104,000 guarantee attached to the promissory notes as securities. He had gone carefully through the evidence, and could not see what had been done with these securities. There was no evidence as to their value, and there had been no tender. What had become of them?

Mr. Searle said he could not tell. He took it that these securities, that was securities for £2,000, were actually sold with a view to reduce the amount from £104,000 to £102,000. There was some evidence of that given by Mr. Steytler. The Union Bank liquidators tendered all their rights against Lippert's estate; that would be

such securities as they now held in respect of the guarantee.

The Chief Justice: The £104,000 it is admitted was a renewal of the debt then existing of £110,000. There were 100 De Beers shares attached to the promissory notes for £11,400. What had become of these shares?

Mr. Searle said the plaintiffs still held them, but made a tender of them in the declaration.

The Chief Justice: But they are probably worth more now than then?

Mr. Searle: They are not worth quite so much, by £1,000, I think.

The Chief Justice: Then Beit's loss would not be so great. Then there is a sum of £53,000: that is made up from the £28,800 and £25,000. Was not the whole amount due in December?

Mr. Searle: No. Four drafts were drawn subsequently of £8,000, £5,000, and one of £10,000. These were amalgamated into £28,800, which was again amalgamated into £28,800. The £28,000 bills were due in April.

The Chief Justice: Was not the full amount of £167,000 due in December, before the payment of the notes?

Mr. Searle said the whole amount was not due on that date.

The Chief Justice suggested that possibly there might be some discounts and interest added, but practically was not the amount the same?

Mr. Searle urged that there was a considerable increase; Mr. Steytler said so.

Mr. Schreiner said no fresh advance was made, any additions to the amount was by way of interest, &c.

Mr. Searle, after consulting with Mr. Steytler said the bills were the same before December and after December, except a difference of £100.

The Chief Justice said what he wished to know was whether, before the two forged notes were paid, was the amount of £167,000 actually due by Lippert to the bank in respect of these transactions?

Mr. Searle said the guarantee of £20,000 was in the bank.

Mr. Justice Buchanan: And there was a liability of £110,000.

Mr. Searle: That was Lippert's.

The Chief Justice: Then the whole amount of £167,000 was due in December, though not by Beit?

Mr. Searle: Yes.

Postea (March 12.)

The Court delivered judgment.

The Chief Justice said: This is an action upon two promissory notes for £58,800 and £11,400 respectively, and a so-called guarantee for £104,085 2s. 6d., made in favour of the Union Bank, of which the plaintiffs are the official liquidators.

No attempt has been made by them to prove the genuineness of the signatures to the three documents. They all purport to be signed by Max Michaelis, by the procuration of Beit, the defendant, but Michaelis has positively sworn that the signatures are not his, and all the circumstances of the case fully support his denial. The signatures were in fact forged by Lippert, who was credited by the Union Bank with the amounts, and the question to be determined, upon the pleadings as they stand, is whether Beit has authorised or adopted or ratified the signatures as binding on him. Of express authority to Lippert to use the name of Beit or Beit's agents there is no evidence whatever, but that does not conclude the matter. An authority to make promissory notes, or accept bills, or sign guarantees, or to do any other act on behalf of another person may often be implied from the conduct of the person in whose name or on whose behalf the act purported to be done. If, to put the simplest case, a person stands by and raises no objection while a promissory note is being made and signed in his name by another, this would to all intents and purposes constitute such person the maker of the note. To hold him liable as such would be in literal accordance with the well-known rule of our law: *Semper qui non prohibet pro se intervenire mandare creditur*. The principle of this rule is capable of application to cases of a more complicated nature. Thus, a person may not be present while another is doing an act, as, for instance, purchasing goods on credit on his behalf, but he may on previous occasions have paid for goods which had been ordered in a similar manner. From his conduct on these occasions the seller might fairly infer that the person on whose behalf the fresh purchase was made had authorised the purchase on credit. "It will not do," however, as was pointed out by this Court in "*Westhuyzen v. Pope*" (2 Menz., 60), "for the seller in such a case to allege that from such acts done by B and recognised by A, and which had previously come to his knowledge, he supposed that A must or might have given authority to B to do some other acts; he must be able to prove that such acts had been done by B and recognised by A as were sufficient to induce a third person, acting with due prudence and discretion, *bona fide* to believe that B had actually authority from A to enter into the very transactions in respect of which he, the third party, attempts to impose a liability in his own favour on A. This is necessarily a jury question." But if a man's conduct is such as to amount to a virtual representation that a certain state of facts exists, the Court will not hesitate to hold him to such representation at the suit of the person to whom it was made, and who has acted upon it. Accordingly in the case of "*Faure v.*

Louw" (1 Juta, 8), where the conduct of the defendant had been such as to lead third parties dealing with his son to believe that he had a general authority from the defendant to make and endorse notes on his behalf, the Court gave judgment in favour of a *bona-fide* endorsee of notes, who gave value for them in the belief that the signature was duly authorised. In that case the son had admittedly been the agent of the defendant during his temporary absence from the Colony, and there had been no attempt on the part of the son to forge his father's signature. We have now to deal with a case in which pre-existing debts were secured by means of admittedly forged documents by a person who had never been the agent of the party whose name was forged. Lippert had obtained large credits from the bank, and among the securities which helped to sustain his credit were a forged guarantee of £5,000, bearing the signature of E. Bruch, "p.p. A. Beit," and a series of forged promissory notes discounted and retired from time to time, and purporting to be made by E. Bruch "p.p. A. Beit." On the 15th of April, 1889, Lippert's indebtedness to the bank amounted to £285,000, including Beit's promissory notes, on which Lippert was liable as indorser for £70,800. But these were not the only forged notes which had been dealt with by Lippert. There were two notes for £18,500 and £11,400 respectively, being dated the 6th of April and purporting likewise to be made and signed by E. Bruch, "p.p. A. Beit," which after passing through the Union Bank had been rediscounted at the Standard Bank by the manager of the Union Bank, without the knowledge of his directors. On the 15th of April E. Bruch, who was then the general agent of the defendant, was in Lippert's office in Cape Town, and while there received a letter that the manager of the Standard Bank wished to see him at once. Lippert, when informed of this, seems to have thought that the manager of the Standard Bank wished to make inquiries about the two forged notes in that bank, for, according to Bruch's letter to Beit, dated 21st April, 1889, Lippert "got as white as chalk," asked Bruch to his private room, and confessed his crime. The crime so confessed was that there was a forged guarantee in the Union Bank for £5,000 and two forged notes in the Standard Bank for £18,500 and £11,400 respectively. It is quite clear that Bruch knew nothing of any other forged notes, and that Lippert told him nothing about them. Lippert, however, represented to Bruch that unless he was assisted immediately to the extent of £50,000 to meet his pressing liabilities, it would be impossible to prevent discovery of the forgery, and that as to the two forged notes, they could be kept over until December, so that in the meantime arrangements might be made for meeting them. Bruch thereupon decided to advance to

Lippert £50,000 against shares valued by him at £48,560, and afterwards increased the advance to £80,000 upon additional security. In this manner time was gained to consult the family of Lippert as to the payment of the two forged notes, but no definite promise was made to Lippert that they would be paid. The defendant, when informed by Bruch of what he had done, strongly disapproved of it, but after being informed of all the circumstances he withdrew his objection. On the 18th of April the manager of the Union Bank informed his directors that he had advanced £160,000 to Lippert without the sanction of the Board, and after discussion it was resolved to accept the position and negotiate with the Standard Bank with the view of obtaining a loan to enable the Union Bank to tide over the difficulty in which it was placed. Arrangements were thereupon made between the Union Bank and Lippert, by which the latter should sign a promissory note for £110,000 in consideration of the bank taking over certain time bargains of Lippert. To the extent of £20,000 the defendant was to be security for this promissory note and a forged guarantee for that amount purporting to be signed by K. Bruch, "p.p. A. Beit," was given to the bank. An arrangement was also made between the Union and Standard Banks on the 24th April, by which the latter bank agreed to advance the sum required by the Union Bank "provided they were secured by shares, bills, and other securities, together with a guarantee from the Union Bank." After this the Union Bank continued to give further banking facilities to Lippert. Thus matters stood when, on the 20th of June, Michaelis arrived in this colony with full instructions from the defendant to deal with Lippert's affairs instead of, but in consultation with Bruch. His view of the situation is clearly given in the letter which he addressed to Beit on the 24th of June. "I called at once," he writes, "on Lippert but my discussions and examinations, which lasted the whole day, did not have the slightest practical result for us. The manager of the Union Bank knows nothing of the forgeries; he seems, after all, never to have been engaged with Lippert up to the amount we presumed; it was or is therefore impossible to exercise moral pressure through him which might result in the withdrawal of the bills through the Union Bank, and as Lippert has nothing left we are placed in the alternative of paying the bills at maturity or of declaring that the signature is forged. Lippert assures me that a written agreement exists between the Union and Standard Banks according to which his position must be kept up until the end of November, and that during this time also the bills were not to be presented, and that, therefore, we need not take any

notice of them. I told him that as soon as the bills were presented to us we should be forced to declare that they were forged, because our firm had no material interest to spare him, and he certainly would not expect you alone to pay such an enormous amount. He replied that he was aware of all this, but the bills would assuredly not be presented. One can explain this confidence in connection with some other matters only in the following manner, i.e., that he forges afresh the bills which are payable at his office, and it is probable that these forgeries have been already going on for a considerable time, and that they have helped him to the large credit which the bank has given him. I have had copies of the statements which I saw in Cape Town sent up here, and shall forward them to you by next mail. From them you will easily be convinced that the man was never in a position which would justify or explain the enormous support he got from the bank. The only explanation would be: Either that he has everything on joint account with the manager, which he most emphatically denies, or that for a long time past he has been giving your (forged) accommodation bills as cover, and thus made the bank believe that you had made it your special duty to support him." In this letter the name of Lippert is not mentioned, but it is admitted that the blanks stand for Lippert. In July, when the two forged notes of £18,500 and £11,400 fell due, they were renewed by Lippert in the Union Bank, the name of Michaelis being now forged instead of that of Bruch, but I am quite satisfied from the evidence that Michaelis was not aware of this renewal. He remained under the impression that the original notes had been held over, and that they would not be presented to him for payment before the close of the year. In order to meet them and pay the forged guarantee, which he knew to be in the possession of the bank, he obtained £15,000 from Lippert's brother, and joined with the defendant and a few other friends of the family in collecting the remaining £15,000. In October some correspondence passed between Lippert and Michaelis as to when and how the two forged notes should be retired. On the 24th Lippert wrote: "I telegraphed you yesterday morning early that during a conversation with a director of the Union Bank I succeeded in leading the discussion in an unsuspecting manner to the bills, and I was given to understand that in case same would be taken up I could get some more facilities, and in case that you are ready now to take up same I am willing to give up a few thousand pounds which I just want very much. Our telegraphic correspondence shows that I wish to take the bills out of the Union Bank and send them direct to you and to draw against them on

you through the Bank of Africa." Michaelis in his answer, dated 31st October, says: "I am prepared to immediately take up the bills, and it is all the same through which bank, but it is a matter of course that the same be presented to me and come into my possession." On the 4th of November Lippert writes: "My brother had repeatedly made the condition that the bills have to be destroyed at once, which of course suits me very well. I informed you of this at the time in Kimberley. The bills are since maturity in the Union Bank. I wish to take them up against my sight drafts upon you in order to get them into my hands, in order not to pass them again through the Standard Bank, or any other bank, and intend to send them direct to you after having cancelled the signature." On the 14th November Michaelis writes: "The bills, it is true, are payable at your office, but the bank will see nothing in it if you tell them that I prefer to pay them at Kimberley." On the 20th Lippert writes: "With regard to the bills I am very sorry to have touched them, because the Union Bank will now only give further facilities if the bills are taken up, of which action they would never otherwise have thought; they wish to reduce the account as much as possible before the end of the year." Again, on the 12th December, Lippert writes: "The arrangement with the Union Bank expires on the 15th to 20th December, and I am trying to succeed to make a new one, but until now I could not yet succeed. As the first condition the bank asks the payment of £25,000, without this they refuse to do anything at all. Of course they will not sell at present, but for their own sake wait for better times, but I wish to have anything definite about what so far I could not yet obtain. Therefore please be prepared to take up at the abovementioned time the bills as promised." On the 16th Michaelis writes: "I am at any time prepared to take up the bills mentioned by you *here*." On the 20th Lippert writes: "I received in due course your letter of the 16th. The extension of time granted to me has expired to-day, and I took the liberty of drawing on your firm at sight for £24,900, against which I beg to hand you enclosed bills which I have taken up, and with which please proceed as arranged." The promissory notes enclosed in this letter were the two of April, 1889, but the portions on which the forged signatures were had been cut off. Michaelis at once, by telegram, objected to this mutilation, and some telegraphic correspondence passed between him and Lippert, who said, among other things, that he could not find the missing portions. On the 24th of December Lippert wrote: "The bills have been taken out of the bank and mutilated, and you, as far as I know, have up to the present not yet paid my draft. How shall I explain this to the Union Bank, or give

the bills back? Hitherto I could give no explanation to the bank, but told them that I am waiting for a telegram from you. To-morrow I have to go to town and give an explanation. That depends upon what you may eventually wire to me. If I do not receive an answer I must confess the state of affairs, there is no other way out of it for me." Before this letter reached Michaelis he had telegraphed: "Will pay to-morrow, wishing compliments season," and on the 26th he wrote expressing his surprise and displeasure at the mutilation, and adding that "in case the guarantee is also presented to me that must be in thorough order, or otherwise it will be refused by me." The draft which passed through the Union Bank, and on the face of it purported to be for the purpose of taking up Beit's promissory notes of £13,500 and £11,400, was duly paid by Michaelis on behalf of Beit. Thereafter Lippert induced the bank to renew the note of £110,000 (made by Lippert in April and secured by Bruch's forged guarantee for £20,000) by taking a promissory note dated 21st December, 1889, payable on the 1st of December, 1890, and made by Lippert in favour of the bank. This note was secured by shares, a list of which is endorsed and valued on the back of the note at £104,085. On the face of this note is the forged signature of Max Michaelis, "p.p. A. Beit," whereby he binds himself as surety and co-principal debtor. This is one of the documents upon which the defendant is now sued. On the 12th of February, 1890, Lippert's clerk Capelle gave the bank a promissory note for £58,800, dated the 12th February, 1890, falling due on the 1st of December, 1890, and bearing the forged signature of Max Michaelis, "p.p. A. Beit," as maker. This note was given to retire two forged promissory notes for £28,800 and £25,000 respectively, the first of which was due before December, 1889, and the second had apparently been discounted with the bank after Michaelis paid the draft in December. The promissory note for £58,800 is the second document now sued upon. On the 31st May, 1890, Capelle, Lippert's clerk, gave the bank a promissory note for £11,400 with the forged signature of Max Michaelis, "p.p. A. Beit," as maker. This was merely a renewal of a note for the same amount which had from time to time been renewed. Attached to it is scrip for 800 De Beers Consolidated Mines shares, and as the shares are worth nearly the whole amount of the note, little importance attaches to the question of liability on this note. This is the third document now sued upon. It is important at once to observe that all the debts to secure which the three forged documents in suit were given had been due by Lippert to the bank before Michaelis paid the two forged bills

of £18,500 and £11,400 respectively. Upon the above facts I may state at once that there is one ground, and one ground only, upon which Beit could in my opinion be held liable, if at all, to the bank. His agent Michaelis, by his acts and conduct, undoubtedly made a false representation to the bank to the effect that the two forged notes which he paid were genuine, and had been duly signed by E. Bruch on behalf of Beit. He shrewdly and correctly concluded that these notes were but two of a series of previous forgeries, that they had helped Lippert to the large credit which the bank gave him, and that Lippert had made the bank believe that Beit made it his special duty to support Lippert. These conclusions he communicated to Beit. He was informed by Lippert that it was only on condition of the two forged notes being paid that the bank would give further banking facilities to Lippert. If Michaelis, in making the false representation intended, or must be presumed from the mode and circumstances in which he made it to have intended, that it should be acted upon by the bank to its prejudice, then his false representation would also be fraudulent. And if the bank was induced by such false and fraudulent representation to enter into certain dealings with Lippert which it would not otherwise have entered into, or to refrain from enforcing remedies against Lippert which it would otherwise have enforced, then the bank would have a remedy against Beit for any damages which it has as a direct consequence sustained. This is the real effect of the judgment of this Court in "*Tait v. Wight*" (7 Jut., 158), which I fear has often been misunderstood. After all the evidence, none of which was specially directed to this question of damages, had been taken, and after Beit had left for England, an application was made to the Court for leave to amend the declaration so as in some way to raise the question of fraud, but even then the proposed amendment did not state the nature of the fraud with precision. It is obvious that the Court could not at that stage, without the risk of doing great injustice to Beit, allow the amendment. As the form of our judgment will allow the question of fraud to be raised, in case a fresh action should be brought against the defendant, I wish to express no opinion one way or the other whether such an action would, under any circumstances, be successful. The question to be decided, as I have already remarked, is whether Beit is liable on the three documents in suit on the ground that he has, by the conduct of his duly-authorised agents, authorised or adopted or ratified the signatures as binding on him. It is not alleged that the bank ever was led by such conduct to believe that Lippert had himself signed the documents on behalf of Beit. On the contrary, it is urged that

the conduct of Bruch and Michaelis led the bank to believe that the signatures were theirs and theirs only. It is quite impossible, therefore, to hold that the defendant led the bank to believe that Lippert had his authority to use his agent's name for the purpose of making promissory notes or signing guarantees. The only way therefore in which the defendant could be deemed to have authorised the signatures to the documents in suit would be by holding that the recognition by Beit of E. Bruch's signature led the bank to believe that the signature of Max Michaelis was also genuine. Now, if the three documents in suit had purported to be signed by E. Bruch, "p.p. A. Beit," in the same manner as the two adopted notes had been signed, there would have been a strong argument for holding that Beit had adopted such signatures also, and had led the bank to believe that the forged signatures of Bruch were genuine, and that similar signatures would in future be recognised by Beit. But there is no proof whatever that the defendant ever led the bank to believe that the signature of Michaelis was genuine. It surely was not prudent or cautious on the part of the bank, when documents imposing a liability to the extent of £167,000 upon Beit were presented to them, not to make some inquiry as to the genuineness of the signature. The recognition of Bruch's signature may have put the bank off its guard, but still that did not amount to a recognition of Michaelis's signature, and such a recognition must be established before the signatures to the notes in suit can be held to have been authorised, or adopted, or ratified. It is quite clear from the letter of Michaelis that he himself never supposed that the payment of notes forged in the name of Bruch would lead the bank to receive notes forged in his own name. At that time Beit had revoked the agency of Bruch, and put Michaelis in his place. Michaelis supposed that the payment of the two forged notes would lead the bank to give fresh facilities to Lippert, and he was utterly callous as to the consequences to the bank, but he never supposed that Lippert would forge his name. His conduct is only to be explained upon the supposition that he did not expect that there would be any further forgeries. His main object was to conceal the evidence of Lippert's guilt, but if he had suspected that, as a consequence of his assistance, Lippert would be guilty of fresh forgeries he certainly would not have rendered that assistance. It is quite clear that he did not know of the renewal of the two notes in the Union Bank in July in his own forged name "p.p. A. Beit." On the contrary, his evidence, as well as the correspondence, shows that he had been misled by Lippert into the belief that the two original forged notes of Bruch's were being held over, and had not been retired by fresh

notes. Applying then the principles with which I opened my remarks, the precise question of fact to be determined is whether the recognition by the defendant of two of Bruch's forged notes, and the general conduct of the defendant's agents, Bruch and Michaelis, were sufficient to induce the bank, acting with due prudence and discretion, *bona fide* to believe that the signatures of Michaelis to the three documents in suit were genuine, or if they were not genuine, that they had been authorised by the defendant. For the reasons which I have already given this question must be answered in the negative. It follows that the plaintiffs are not entitled to recover the amounts of the three notes in question. This case has, of course, to be decided under our own law, but it is satisfactory to find that if the law of England, or even of Scotland, had been applicable the result would probably have been the same. Bell, in his "Commentaries on the Laws of Scotland" (vol. 1, p. 414), says: "A bill of which the signature is forged is no legal ground of action or of diligence," which is the Scotch equivalent of our provisional sentence, "and will not sustain a claim in bankruptcy. But if one have given sanction and currency to acceptances or endorsements forged by a particular person, as binding on him, he will be liable as having adopted that subscription and authorised it as his own." It is not clear whether he means that there is an adoption of the particular subscription which has been sanctioned, or of subscriptions similar to it, but he clearly does not mean that the sanction of the forged signature of one agent would amount to the adoption of the forged signature of another agent. The Scotch case which comes nearest to the present is that of "Urquhart v. Bank of Scotland," which is stated as follows by Lord Watson in the case in the House of Lords of "McKenzie v. British Linen Company" (6 L.R. Ap. Ca. 112): "It was proved that the suspender's signature to the bill charged on was forged; but it was also proved that notice of protest of the bill for non-payment was received by him on or about the 2nd of August, 1871, and that he wrote to the bank on the 28rd that his signature was a forgery, his friend and intimate, the forger, having in the meanwhile absconded. It was proved that the forger was subsequently tracked out and apprehended under a criminal warrant; and it was also proved that the suspender knew, or had good reason to know, that the forger had for some years previously been in the habit of forging his name upon bills, and that in June, 1870, he had given the forger money to retire one of those bills known by him to be forged." The judgment of the Court was against the suspender, and great stress was laid on the silence of the suspender

after receiving notice of protest as one of the grounds of the decision. In the present case Michaelis, as soon as he received information of the existence of the forged documents in suit, denied his signatures and made an affidavit to that effect. This was done before they even fell due. Another circumstance distinguishing that case from the present is that there it was the suspender's own name which was forged in all the bills. In the case of "McKenzie v. British Liner Company," which was an appeal from the Court or Session to the House of Lords, it was held that "a person who knows that a bank is relying upon his forged signature to a bill cannot lie by and not divulge the fact until he sees that the position of the bank is altered for the worse, but that there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery, during which the position of the bank was in no way altered or prejudiced, can be held to be an admission or adoption of liability, or an estoppel." The case was one in which notice of the bill in suit had been given to the defendant, who did not raise the question of forgery until a fortnight afterwards. "I cannot think," said Lord Blackburn, "that even if McKenzie (the person whose name had been forged) had gone so far in his endeavours to shield Fraser, the forger, from the consequences of his criminal act as to make himself liable to criminal proceedings for an endeavour to obstruct justice, that would bar him from averring against the bank that the signature was not his. Certainly I think that his not telling the bank on the 15th of July, nor till the 29th of July, that it was a forgery, and so letting them continue in the belief that it was genuine, if he had not induced it, could not so preclude him if, as I think was clearly the fact here, the bank neither gave fresh credit in the interval nor lost any remedy which, if the information had been given earlier, they might have made available." In the present case, as I have already remarked, the defendant, after discovering the forgery of the notes in suit, did not let the bank continue in the belief that they were genuine, and therefore no question can arise as to the bank's position being altered after such discovery. Turning to English cases cited, the first, that of "Barber v. Gilling" (8 Esp. 60), is so briefly reported that it is difficult to say what was the point actually decided by Lord Kenyon. The explanation of it, given in the subsequent case of "Morris v. Bethell" (5 L.R., C.P., p. 50), is probably the correct one. In the latter case the jury, in answer to questions left to them, found that the acceptance to the bill declared on was not the defendant's signature, nor authorised nor adopted by him; that he did not know that the plaintiff had held a former forged bill of his when he paid it; and that he did not lead the plaintiff to believe that the acceptance to

the bill was his signature, or was authorised by him. A verdict was thereupon entered for the defendant, and a question was reserved for the Court of Common Pleas whether judgment should not be for the plaintiff. Bovill, C.J., in his judgment, said: "I now entertain some doubt whether I ought to have left the case to the jury at all. . . . The only ground upon which a man can be held responsible as the acceptor of a bill signed by another in his name is that he has authorised or adopted the signature, or has so conducted himself as to be estopped from disputing it. Now, what had the defendant done here? He had on a former occasion paid a bill of which the plaintiff was the holder, which had been similarly accepted in his name without his authority; and it is contended that he thereby held out to the plaintiff that he would treat as genuine and pay all bills so accepted. There was no evidence that the defendant ever knew that the plaintiff was the holder of the former bill; and the plaintiff seems to have made no inquiry when he discounted the bill in question. If it were made to appear that there has been a regular course of mercantile business, in which bills have been accepted by a clerk or agent whose signature has been acted upon as the signature of his principal, there would be evidence, and almost conclusive evidence, against the latter that the acceptance was written by his authority. That was the case of *'Barber v. Gilling'*. It would have been idle to contend there that the defendant was not responsible for the signature. The report is short; but I do not understand it to have been treated as matter of law, but rather as a conclusion of fact by the jury. Here the transaction was not of a mercantile character; there was no course of business between the parties. What then does the payment of one bill under such circumstances hold out? Is it that, as a matter of law, the party binds himself to pay all future bills which may assume to bear his acceptance, whether authorised by him or not? I should be sorry to affirm such a principle; and I think no jury could safely act upon the notion of authority or adoption under such circumstances." Willes, J., said: "In the absence of proof of any authority or adoption or course of business, the payment of the bill in August, 1867," the first of the two forged bills, "was only evidence of an admission that that bill was accepted by him or by someone acting under or authorised by him; not of a general authority in that person to accept bills in his name." And Brett, J., said: "I must confess I have great doubt whether there was any evidence at all to go to the jury. But, if there was, the jury have disposed of it, and properly, I think. The argument in effect amounts to this, that if a man by payment once authenticates a forged acceptance he is bound for ever unless he

gives notice. There is no foundation whatever for such a proposition." The remarks in favour of the defendant in that case would probably have been still more emphatic if the question had been whether the payment of the forged acceptances of one agent amounts to an authentication or adoption of another agent's forged acceptances. Before concluding, I would remark that if it were the duty of this Court to perform the part of *censor morum*, this case would afford abundant material for the exercise of its functions. The incompetence of the directors of the bank, the recklessness of its manager, and the consequent loss entailed upon the too-confiding shareholders, would supply themes for comment and disapprobation, but I prefer to adhere to the rule which I have always followed, not to travel in my remarks, regarding litigants beyond what is required for the proper elucidation of the decision. Lippert, the arch culprit and the prime cause of the present proceedings, is still at large. When first his forgeries were disclosed to the public, he wrote to the chairman of the bank offering to return to the Colony, but he hinted that it would be for the interest of the bank that he should keep out of the way. As his presence can no longer be injurious to the bank, he may perhaps now be induced to deliver himself up to justice and thus make some atonement for a series of the most heartless and deliberate crimes ever committed in this country. As to the defendant Beit himself, it is only fair to say that the steps for hushing up Lippert's known forgeries and lulling the bank into a sense of false security, were at first taken without his knowledge or consent. But he was informed by Bruch of those steps, and he did not, as a man with a keen sense of moral propriety would have done, refuse to sanction the active concealment of a crime and the removal of the proof of guilt. He appears to have expressed no indignation at his agent's (Michaelis) remarks as to the moral pressure which might have been exercised on the manager of the bank if the latter had been deeply involved with Lippert. When he was told by his agent (Michaelis) that Lippert's forgeries had helped him to the large credits given to him by the bank, and had led the bank to believe that he (Beit) had made it his especial duty to support Lippert, there was still time to stay Michaelis's hand, and so prevent him from assisting Lippert in obtaining time or further banking facilities from the impoverished bank. As late as December, 1889, the bank, if informed of the forgeries known to Beit, would have been able, by realisation of securities, to recover from Lippert many thousands of pounds more than it could possibly recover when the crash came in July, 1890. Instead of being supplied with this information, the bank

was strengthened in its belief that the two notes known to Beit to be forged were genuine by the payment of the draft which, on the face of it, purported to be drawn on Michaelis to meet his two notes, which were the self-same forged notes. As I have already shown, the defendant cannot in the present action be held liable for the damages, if there are any, as to which I express no opinion, resulting from his conduct. But in giving judgment in the defendant's favour the Court may mark its sense of the conduct of his agents, which was ratified by him, by not giving him his costs. The liquidators found the three documents in suit among the securities of the bank, and they were perfectly justified in suing the defendant upon them unless he, or his agent Michaelis, could give a full, frank, and satisfactory explanation of all the circumstances under which the two other forged notes had been paid. That explanation was withheld by Michaelis, and it was not given until the case came into court. In order not to debar the plaintiffs, if so advised, from instituting fresh proceedings against the defendant, the judgment will be absolution from the instance, but each party must bear their own costs.

Mr. Justice Smith said: The facts connected with this case have been so fully and lucidly stated in the judgment just delivered, and as they have been summarised by my brother Buchanan in his judgment, I have had the opportunity of reading his summary, and as I agree to the statement of facts therein contained, it is unnecessary for me to go over the same ground. With regard to the law, I do not propose to analyse and discuss the reported cases and the dicta of text writers bearing upon the questions raised in the present case, which have been so fully dealt with. It is sufficient for me to state briefly what, in my opinion, is the principle of law to be derived from these cases as applicable to the claim made by the plaintiffs in their declaration. A person who is aware that a forgery has been committed incurs no civil liability by merely remaining silent. If by his course of dealing or by his conduct he has acted so as to induce another, acting with due prudence, to alter his position and to enter into fresh transactions of the same nature to his detriment, he (the person so acting) would be liable for the loss sustained. Whether or not he has done so is a jury question, to be decided upon all the circumstances of the case. The plaintiffs' counsel stated in his argument that the conduct of the defendant led the bank to believe that Lippert had authority to sign promissory notes in the name of his agents, signing p.p. on his behalf. I do not see how this argument can be sustained, as there is nothing to show that the bank ever believed this. He further argued with

more force that the defendant by the conduct of his agents, which he had ratified, led the bank to believe that Lippert was authorised to bring to the bank and get discounted promissory notes purporting to be signed or to be guaranteed by the defendant's general agents in the Colony, and that by such representation the bank was induced to alter its position to its detriment. It might be urged that the conduct of the defendant in paying bills signed Bruch p.p. Beit did not amount to a representation that he would pay bills signed Michaelis p.p. Beit, but assuming that it amounted to a representation by defendant that he would pay promissory notes purporting to be signed by defendant's agent p.p.; the plaintiffs must, in order to sustain the claim made in the declaration, show that in consequence of the payment of the two promissory notes for £18,500 and £12,400 the bank sustained the loss for which they seek to make the defendant liable through being induced to give additional credit to Lippert on promissory notes purporting to be signed or guaranteed by defendant's agent. Now at the time when these two promissory notes were paid the liability for £104,065 2s. 6d., the liability for the other promissory note of £11,400, and the liability upon the eight notes amounting to £28,400 existed. After this the liability on defendant's paper was increased by £25,000 by the bank discounting for Lippert three promissory notes for £5,000 each and one for £10,000, which, with the £28,800, were afterwards included in a promissory note for £58,800. But the liability to the bank would have been substantially the same if the two promissory notes had not been paid, as they amounted to £24,800. In other words, Lippert's liabilities to the bank on transactions in connection with Beit were, at the stoppage of the bank, substantially the same as they were before the two promissory notes were paid. In the remarks made I have assumed that the Court, acting as a jury, has found that the acts done by Lippert, and coupled with the conduct of the defendant's agents recognised by the defendant, had induced the bank, acting with due prudence, to change its position to its detriment. If it is necessary for me to answer the question whether the bank acted with due prudence in discounting these fresh notes, by which it incurred a further loss of £100, I must answer in the negative. I consider that the bank directors and the manager, in returning the guarantee of the defendant for £20,000, signed by Bruch, to Lippert, and accepting another for £104,000 signed by Michaelis, without advising Michaelis, was an act of imprudence that contributed directly to the loss. It was said that it is not customary to return collateral securities to their owners nor to give them any advice. Mr. Hall's evidence upon this was unsatisfactory. It may be that in ordinary mercantile transactions it

is not customary, and that a bank trusts to its customer. But in a large transaction of this nature, where the customer is a speculator, I cannot but think that if the bank chose to place such blind confidence in Lippert it did so at its peril. All throughout the transactions the bank seems to me to have acted most imprudently. Hall, the manager, had previously to the arrangement in April allowed Lippert to draw large sums against cheques drawn by Lippert upon other banks, but which were held over during part of March and April, and were never cleared, but ultimately withdrawn upon Lippert bringing the two forged bills of £18,500 and £11,400, which were then financed by Hall and placed to Lippert's credit. He had also made other advances to him to the extent of £155,000. All these transactions had taken place without the knowledge of the directors. In April there was a deficiency in Lippert's account between the amount advanced and the then value of securities held by the bank of about £95,000. In December it was over £200,000, and in July, 1890, it was over £400,000. Promissory notes of the defendant's, many of them clean bills to a very large amount, made payable at Lippert's office, were time after time brought to the bank and discounted, and when they became due they were renewed. As the defendant was known to be a man of very large means, one would have thought that it would have occurred to the directors that it was strange that a man of such great wealth, and who was considered by the chairman of the Board to be a partner with Lippert in a sort of way, should allow his promissory notes to be renewed, particularly when the bank was charging 8 per cent. for discounting such renewals. That this did not put the Board upon inquiry is to me, to use the chairman's expression, a conundrum. The defendant by his evidence impressed me favourably, and I think he was actuated by a sincere desire to save his cousin and the family from disgrace, but I cannot understand the conduct of his agents. How they could write to and treat a forger of bills to such an amount in the way they did is a mystery. Although Michaelis's surmises turned out to be correct, I think he thought that the other forgeries were of other bills, of which the two for £18,500 and £11,400 were the outcome, and I think that both he and the defendant thought that it would be such a lesson to Lippert that he would commit no other forgery, and, as Michaelis said, if he had thought that Lippert had committed other forgeries unconnected with these two notes, was it likely that he would have paid them? Whether Michaelis was justified in acting as he did is another question. However, I do not think that their conduct would have caused the bank to suffer the loss if the directors and manager had acted

with due prudence. I am of opinion that the plaintiffs have failed to establish any liability of the defendant in this action, and that the judgment of the Court should be absolution from the instance, but that to mark the disapproval of the Court of the conduct of the defendant's agents, that it should be without costs.

Mr. Justice Buchanan said. The plaintiffs in this case are the official liquidators of the Union Bank, which stopped payment on the 30th July, 1890, and was thereafter placed under the operation of the Winding-up Act. The defendant Beit resides in England, and carries on business there as well as at Kimberley, and was represented in this colony first by Ernest Bruch, and latterly by Max Michaelis. W. A. Lippert, a cousin of the defendant's, who traded as W. A. Lippert & Co., and who resided in Cape Town, in 1888 and 1889 speculated very extensively in diamond and gold shares, discounting with and obtaining large advances of money from the Union Bank. When the bank closed its doors it held, among other paper discounted for Lippert, a promissory note for £53,390, dated 12th February, 1890, due 1st December, 1890, and a promissory note for £11,400, with scrip of 800 De Beers shares attached, dated 31st May, 1890, due 2nd September, 1890, both purporting to be signed "p.p. A. Beit, Max Michaelis," in favour of and endorsed by W. A. Lippert & Co. There was also a document in the form of a promissory note, with a pledge of a long list of specified gold scrip as security, signed by Lippert & Co. in favour of the bank for £104,035 2s. 6d., dated 21st December, 1889, and due 1st December 1890, and across the face was written the following: "I hereby bind myself as surety in *solidum* and co-principal debtor for the due payment of within promissory note.—p.p. A. Beit, Max Michaelis.—Kimberley, 26th December, 1889.—Witness: G. Hinsch." The estate of Lippert & Co. was compulsorily sequestered on the 7th August, 1890, and the plaintiffs proved these liabilities on the estate, and have been awarded dividends amounting to £245 8s. thereon. In the first count of the declaration plaintiffs pray judgment against the defendant for the amount of these notes and guarantee, tendering to cede the benefit of their proof on Lippert & Co.'s estate, and this tender, it has been stated, is intended to include the scrip specially pledged as security for these notes. To this claim the defendant, while admitting the agency of Michaelis, denies his signature to the documents, and disputes all liability thereon. On this issue is joined. In an alternative count the plaintiffs claim judgment against the defendant, even should these signatures be proved to have been written by Lippert, on the ground of an implied contract of agency, in that the conduct of the defendant was

such as to lead the bank into the belief that the notes were genuine, and that the defendant had authorised and adopted the acts of Lippert. Looking at the cases cited, it would appear that in England it would be open to the plaintiffs under the first count to show that the defendant is what the authorities term estopped from denying the signature to the notes. Under the alternative count the plaintiffs would have to show that the bank was reasonably justified in presuming that the defendant would acknowledge the signatures as having been authorised by him. The difference between the two is more in the way in which the case is stated rather than in the practical result. In either view it is necessary to look at Lippert's dealings, and to consider defendant's conduct in relation thereto. The books of the bank show that, as far back as 1888, there were among Lippert's discounts acceptances purporting to be signed on defendant's behalf, per procuration of Bruch. As a fact, there were no business transactions between them except a few purchases of shares in the open market through a broker, and the defendant had never signed promissory notes in Lippert's favour. Hall, the cashier and chief official of the bank, though having limited means, had also speculated to a considerable amount, and had been assisted in his transactions by Lippert. At some period before 10th April, 1889, Hall, without the knowledge and concurrence of his directors, advanced to, and pledged the credit of the bank for Lippert to the extent of nearly £160,000, in addition to the large amount otherwise due by Lippert to the bank. Lippert needing money during March, Hall had allowed him also to create for himself a fictitious credit by giving his cheques on other banks, which cheques Hall placed to the credit of Lippert's current account with the Union Bank, and then holding the cheques over and not clearing them. On the 10th April Lippert handed to Hall two promissory notes which play a prominent part in this case. These notes were dated 6th April, and were payable 10th July, for £11,400 and £18,500 respectively, and purported to be signed "p.p. A. Beit, E. Bruch." They are sometimes referred to in the correspondence as being for £25,000. Without informing his directors of the fact, and without entering them in the books of the bank, Hall discounted these bills, endorsed them for the Union Bank, and the same day re-discounted them with the Standard Bank, and with the proceeds allowed Lippert to retire the cheques on other banks which had been held over. On the 15th April Lippert's liabilities to the bank amounted to £285,076, including an overdraft of £64,794, and acceptances purporting to be signed by Bruch for defendant for £41,100. One of these was another promissory note for £11,400 covered by 800 De Beers shares, which note was renewed by

Lippert with forged acceptances from time to time, and is represented by the note for the same amount, with the scrip still attached, now sued upon. Against the overdraft the bank held certain other scrip and a guarantee for £5,000, signed "p.p. A. Beit, E. Bruch." All this was in addition to the two notes totalling £24,900 before referred to, which at that date did not figure in the bank's books. All these signatures are sworn to be forgeries. Lippert having other acceptances falling due which he was not prepared to meet, applied to Bruch, who was then on a visit to Cape Town, for assistance. If such assistance could not have been obtained Lippert would have been forced to stop, and the forgeries must have become known. Bruch has since, in July, 1890, died, and Lippert, who left the Colony on the 5th February, 1890, and against whom a criminal warrant was afterwards issued, has absconded, and the only evidence as to what took place between them is to be had from the telegrams and correspondence which passed at the time between Bruch and the defendant. From these it appears that on or about the 17th April, Bruch, while in Lippert's office, received a message from the Standard Bank to the effect that the manager wished to see him at once. Upon this Lippert became alarmed, and made a confession to Bruch, but apparently only acknowledged as forgeries the notes for £24,900 and the guarantee for £5,000. It does not appear that Bruch ever became aware of any of the other forgeries. Hall about the same time resolved to inform his directors of his unauthorised acts. Bruch, as defendant's agent, on this date advanced Lippert £57,000 taking as security certain scrip, and subsequently he increased the amount to about £80,000. This was done with the object of enabling Lippert to tide over the immediate pressure, and to give time to communicate with Lippert's friends, and to endeavour to raise money to retire the forgeries for £24,900. With the assistance obtained from Bruch Lippert paid a number of acceptances with scrip attached in different banks, the only bill held by the Union Bank then paid being one to which Bruch's name, p.p. the defendant, had been forged for £5,700, of which bill Bruch apparently had no knowledge. By paying this note Lippert released the scrip of 400 De Beers shares which had been attached to it as security, and these shares formed part of the securities handed by Lippert to Bruch. Bruch cabled to defendant, informing him of what he had done, stating that the matter was "criminal." The defendant strongly condemned Bruch's conduct, but afterwards on receiving Bruch's letter of explanation, and learning that his motive was the desire to save the family from disgrace, the defendant generously acquitted him from blame, and adopted what he had done. On the 18th or 19th April

Hall called a special meeting of his directors, and disclosed to them his dealings with Lippert, and tendered his resignation. The Board censured Hall, but refused to allow him to resign. And here it would be as well to remark that culpable as Hall was towards the bank, reckless as he was in giving credit to Lippert, and deficient as he may have been in sound business capacity, he seems to have been unaware of Lippert's dishonesty and did not participate in his frauds. Mr. Ross, the chairman of the Board of Directors, states that after the 18th of April the directors took Lippert's account into their own hands, and thereafter were always pressing him to reduce his debt. The immediate effect of Hall's disclosure was that the Board resolved to take over all Lippert's liabilities to other institutions, so as to have all his transactions entirely in their own hands and to give him time to work out his estate. They obtained the assistance of the Standard Bank for this purpose, and to meet his outside liabilities Lippert signed a promissory note in favour of the bank for £110,000, pledging certain securities mentioned therein, and forged a guarantee of Bruch's for Beit for £20,000 to cover any deficiency that might arise on realising these securities, the directors agreeing to hold over all Lippert's liabilities for eight months. Mr. Ross says that after the 18th April the bank drew its horns in considerably, and did not make considerable advances on shares to Lippert or to anyone else, the bank's funds being all employed. Bruch having before this intimated his desire to resign his agency, the defendant despatched Michaelis from England to take his place, with full authority to act for defendant in connection with Lippert's affairs. Michaelis arrived at Cape Town on the 20th June, and Bruch left defendant's service on the 3rd July, and the Colony on the 10th July, 1889. Before arriving here Michaelis was aware of the contents of Bruch's letters to defendant, and he at once interviewed Lippert, and after discussion and examination arrived at a very shrewd idea of the state of affairs. Writing to defendant on the 24th June, he states that he was placed in the alternative of either paying the bills at maturity or of declaring them to be forged; that he was assured by Lippert that he had an arrangement with the bank, according to which his position must be kept up until the end of November, and that during that time the bills were not to be presented. This letter was written in German, and one paragraph in the translation at the first blush conveys the impression of a most damaging statement. Michaelis writes that one can explain Lippert's confidence only in the following manner: "That he forges afresh the bills which are payable at his office, and it is probable that these forgeries have been already going on for a

considerable time, and that they have helped him to the large credit which the bank has given him." Michaelis explains this as meaning that he suspected that Lippert had been guilty of a succession of forgeries, which were then represented by the two bills for £24,900. He also writes: "The man was never in a position which could justify or explain the enormous support he got from the bank. The only explanation would be, either that he has everything on joint account with the manager, which he most emphatically denies, or that for a long time past he has been giving your (forged) accommodation bills as cover, and thus made the bank believe that you had made it your special duty to support him." Michaelis, in his evidence, however, says that the only forgeries he knew of at that time were the two bills for £24,900 and the guarantee for £5,000, and that Lippert took his solemn oath to him that there were no others; and that Michaelis believed this is supported by the fact that he afterwards paid the bills for £24,900, which he never would have done if he had known there were other forgeries. Michaelis did not approach the bank, but frequently urged Lippert to get the bills for £24,900 paid and out of existence, but was put off by Lippert, who asserted that by his agreement they would not be presented till the end of the year. On the 10th July, when the notes matured, Lippert renewed them with the bank with forged bills, bearing the name of Michaelis, p.p. defendant, and received the original bills from the bank. Michaelis wrote in July to defendant that the bills had not been presented for payment, and gave Lippert's reason why. About this time Lippert's brother, with whom Michaelis had in the meantime communicated, undertook to pay half the amount of the known forgeries, and gave Michaelis drafts and acceptances for £15,000 for that purpose. Defendant also wrote to Michaelis to pay the other half on his private account. Of this Lippert was informed, but he still put off the matter, fearing, as he said, to arouse suspicion by taking up the bills before the expiry of his agreement with the bank. When the agreed-upon period of eight months was expiring, Lippert negotiated with the bank for a further extension of time for twelve months; and on the 12th December wrote to Michaelis that the bank made it a condition that the two notes, or the "£25,000," as Lippert called them, were first paid. Having come to terms with the bank on the 20th December Lippert drew at sight upon Michaelis for £24,900, the draft stating that it was to meet "your bills" for £11,400 and £13,500 as per agreement. At the same time Lippert sent to Michaelis the two old notes which had matured on the 10th July, representing that he had retired them by means of the draft. Lippert, however, first tore off the signatures.

Michaelis, who was ignorant that the notes had been renewed, at first refused to honour the draft unless Lippert sent the missing portions of the notes, but Lippert stating he could not find them, and repeatedly urging Michaelis by telegram to pay, on the 26th December the draft was honoured, and was credited in the books of the bank on the 28th, when apparently Lippert received the renewals from the bank. These he did not send to Michaelis, and they are not forthcoming. Michaelis produces the mutilated notes in, as he says, the same condition in which he received them from Lippert. As a matter of banking, apparently all Lippert's acceptances were renewed by bills of like amounts as they fell due, and all the forged notes which were discounted with the bank before the 18th April, signed "p.p. A. Beit, E. Bruch," were renewed by paper signed "p.p. A. Beit, Max Michaelis." On the 26th December the bank appears to have held of such paper a renewal of the promissory note for £11,400, to which the scrip for the 800 De Beers shares was attached, certain other notes amounting in round figures to £28,000, as well as the two notes for £24,900, and the guarantee for £20,000 against the bill of £110,000. This bill of £110,000 had been reduced by the sale of certain of the securities, and in renewal of the balance Lippert gave the promissory note sued on for £104,085 2s. 6d., the signature of Michaelis, p.p. defendant, to the endorsement thereon, and the signature of Hirsch as witness both being forged. This acceptance was passed through the bank's books on the 30th December, 1889, on which date Hall wrote to Lippert as follows: "Sir,—We are in receipt of your promissory note in favour of this bank for £104,085 2s. 6d., due 1st December, 1890, against shares detailed at back thereof, and also signed by A. Beit as surety in solidum and co-principal debtor. The said shares we hold as security, and you will be at liberty to sell them or any portion of them between this date and the date of maturity of the said promissory note, viz., 1st December, 1890, on your placing in our hands the net proceeds of any sale of said shares in reduction of the said promissory note. We enclose a form of letter to us, to be signed by Mr. A. Beit, agreeing to the disposal of said shares or any portion thereof connected with the said promissory note of £104,085 2s. 6d., we allowing you a rebate at same rate of discount as charged for any payment on account. Mr. A. Beit having paid certain two promissory notes of his in your favour and discounted by us, due 27th instant, for £13,500 and £11,400, we hereby agree to discount for you fresh promissory notes of Mr. A. Beit in your favour for £25,000 sterling in all, £10,000 sterling of which to be discounted for your account this month and the remaining £15,000 sterling to be discounted for your

account any time you may require same after 2nd January, 1890. The discount on the said £25,000 sterling to be paid by you in advance, as well as the discount on promissory note signed by Mr. A. Beit in your favour, now under discount," &c. After this the notes for £28,000 (which were renewals of forged bills which had been discounted with the bank before the 15th April) disappeared, and £25,000 further having been advanced to Lippert the note for £58,000 came into existence. There was thus no material change in the amount of Lippert's liabilities to the bank on Beit's paper, for on Michaelis paying the notes for £24,900 the bank advanced Lippert an almost identical amount. There was, however, a distinct alteration in what purported to be defendant's liability, for as up to the 26th December the bank held only a forged guarantee for £20,000 against the note for £110,000, after that date they held the forged guarantee for the whole amount of the bill of £104,085 2s. 6d. given in renewal. The guarantee for £5,000 held by the bank before 15th April was allowed to remain with the bank, though it was never presented for payment. Michaelis says he would have paid same on presentment at any time, but that when Lippert left the Colony in February, 1890, he presumed Lippert had settled it. With the exception of paying Lippert's draft in December, 1889, neither Michaelis nor the defendant had any communication with the bank till July, 1890, when, in consequence of having received certain information which put him on inquiry, Michaelis telegraphed from Kimberley to the bank and afterwards came to town, where he saw the notes for the first time and declared them to be forgeries, and this disclosure caused the stoppage of the bank. In coming to a consideration of the defendant's liability upon this state of facts, I think it may be laid down that the question is one for a jury rather than of strict law. There is authority for holding that there is no legal duty on a person, knowing that his name has been forged, to disclose the fact, and silence alone would as a rule not render him liable. It may also be admitted that the payment of one or even more forged bills would not necessarily render the person paying liable for other forgeries. In the words of Mr. Justice Willes in "*Morris v. Bethel*," "one who pays one bill which purports to bear his signature as acceptor thereby makes evidence against himself that the person who wrote the acceptance did so with his authority; and if the bill is given in the course of business implying a continuance of such authority, it may be conclusive evidence." That was apparently the ground upon which Lord Kenyon based his decision in the case of "*Barber v. Gingell*," and upon which the case of "*Faure v. Louw*" was decided in this Court. But though

mere silence or the payment of a single forged bill are not in themselves necessarily conclusive, yet they are circumstances in the case which, with all the other circumstances, should go to the jury, and upon which they are to decide whether the acceptor of a bill signed by another in his name has so acted as to authorise or adopt the signature, or has so conducted himself as to bar him from disputing it. Now, as a juror, I cannot, on the facts before me, find that the defendant ever authorised the signature by Lippert of the notes sued upon. After the adoption of the signatures of the bills of £24,900, and of the guarantee for £5,000, there would have been a stronger case if defendant had continued Bruch as his agent, and if Bruch's signature had again been forged. But after the receipt of the intelligence of Lippert's forgeries from Bruch the defendant changed his agent, it is true not in consequence of these transactions, but yet very soon after they came to his knowledge, and he may fairly have concluded that Lippert would not have risked forging Michaelis's name as well as Bruch's. No forgery of Michaelis's name ever became known to defendant or was ratified or adopted by him, and the bills sued upon are signed by Michaelis and not by Bruch. True the defendant adopted the forgery of Bruch's name to the two bills, but he paid those bills, and discharged himself of that liability. Then again it is difficult to come to the conclusion that there has been any prejudice to the bank. No doubt Bruch knew of the forgeries before the bank took over Lippert's outside liabilities in April, 1889, but at any rate up to the date of Bruch's retirement, in my opinion, there was nothing done by defendant which would have prevented him from denying liability even on the two bills for £24,900. It was after Michaelis became his agent that he undertook to pay them, and did pay them in December, 1889, from which time up to the stoppage of the bank Lippert's liabilities on Beit's paper remained practically the same. But this is an action on specific promissory notes, and I am unable to find as a fact, that the defendant has authorised or adopted the signatures to these notes, or that he has so conducted himself as to preclude him from setting up the defence of forgery. Holding this view, I have not discussed the question whether or not the bank exercised due prudence. On the pleadings before us, under the circumstances I have already stated, in my opinion the plaintiffs have failed in this action, and there must be absolution from the instance. As to costs, it is a sound principle that as a general rule they should be awarded to the successful litigant. But costs are undoubtedly in the discretion of the Court, and in this case I am of opinion that the Court should exercise its discretion, and mark its disapproval of defendant's acts, or rather

of the conduct of his agents—conduct which is morally indefensible—and make no order, leaving the defendant to bear his own costs.

[Plaintiffs' Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

MONDAY, FEBRUARY 22.

[Before Mr. Justice SMITH and Mr. Justice BUCHANAN.]

ADAMS V. SPARKS.

Costs—Resident Magistrate—Judicial discretion—Appeal.

Mr. Searle appeared for the appellant.

This was an appeal on a question of costs from a judgment of the Resident Magistrate of Worcester.

The appellant (plaintiff in the Court below) sued the respondent (defendant) for £1 4s., for work and labour performed as a servant from the 2nd to the 7th November, 1891.

The defendant pleaded that plaintiff had engaged himself as a carpenter to perform skilled labour, but had proved himself utterly incompetent.

Defendant claimed in re-convention £2 2s. 10d., six days' wages, and the balance as money paid to re-place wood alleged to have been destroyed by plaintiff and also for an amount paid for altering his work.

Judgment was given for the plaintiff for 12s., but he was ordered to pay the costs of the action.

The Magistrate stated in his reasons that the defendant had proved that the alteration to the work and fresh material cost 18s. 10d., which amount he (the Magistrate) was inclined to allow him (the defendant) in re-convention leaving a balance of only 5s. 2d., but as it was proved that defendant had offered plaintiff one-half of the original claim, viz: 12s., and that plaintiff declined to accept the offer, he (the Magistrate) thought that judgment should be for plaintiff for 12s., but he should pay the costs of the case. From this decision the plaintiff now appealed.

Mr Searle was heard in support of the appeal and referred to the following authorities: *Dodds v. Barry* (Buch. 74, p. 41); *Kirsten v. Van Hoorden* (Buch. 79, p. 282); *Van Wyk v. Faber* (2 E.D.C.,

p. 182); *Bennett & Webster v. Coetzee* (1 Juta, p. 286) and *Van Rooyen v. Klerck* (2 Juta, p. 149).

The Court held that the Magistrate had not exercised a judicial discretion and allowed the appeal with costs. The judgment of the Magistrate being altered to judgment for plaintiff for 12s. with costs.

[Appellant's Attorney, C. C. Silberbauer.]

SUPREME COURT.

TUESDAY, FEBRUARY 23.

[Before Mr. Justice SMITH and Mr. Justice BUCHANAN.]

VAN RENEN'S TRUSTEES V. VERSFELD.

Donatio inter vivos—Acceptance—Revocation—Deed—Bond—Cancellation—Will—Codicil—Act 7 of 1865—Amended title—Marriage in community—Insolvency—Rights of trustees

Per De Villiers, C.J.—It had been decided as part of the law of this country, that a contract would not be enforced unless it was supported by a consideration, but in all these decisions it had been recognised that a donation, even though no consideration had been given, would be enforced if it was clear that a donation was fully intended and completed. It was one of the exceptions to the rule that a contract required a consideration to support it. But it must be perfectly clear that the intention of the parties was that a donation should in point of fact be effected between them.

Mr. Searle and Mr. Graham appeared for the plaintiffs, and Mr. Schreiner, Q.C., and Mr. Molteno for the defendants.

This was an action instituted by G. W. Steytler and W. A. Currey, in their capacity as trustees of the insolvent estate of Sebastian Valentyn van Renen, married in community of property to Mary van Renen (born Versfeld).

The declaration alleged that the defendants, Jan William Janse Versfeld and Francis Ferdinand Versfeld, were sued in their individual capacity and as executors testamentary in the estate of the late Frances Maria Johanna Versfeld, mother of the said Mary van Renen. That on or about the

28th July, 1881, the said Frances M. J. Versfeld executed a certain deed, whereby she made over to her two sons, the defendants, the farm Klaassenbosch, then registered in her name, for the sum of £4,500, upon certain terms and conditions set forth in the said deed. That the said deed was made in pursuance of a family arrangement, duly consented to by the said Frances M. J. Versfeld and all her children, to wit, the defendants and her three daughters. It contained the condition that the said defendants should take over the existing bond of £1,500 upon the said property, and should pass a bond in favour of the said Frances M. J. Versfeld for £3,000, the balance of the £4,500 above referred to, any arrear interest to be paid to the daughters of the said Frances M. J. Versfeld, and that upon her death the amount of the said bond should be paid to the said daughters, or in case any should predecease her, to their children. That at the date of the said deed the value of the said farm and farming implements far exceeded the sum of £4,500, and at the present time the said value was in excess of the said sum. That the said deed, entered into as aforesaid, constituted a *donatio inter vivos* in favour of the said daughters. The said Mary van Renen and the two other daughters duly accepted the same at the time of the execution of the said deed, and the said acceptance was never thereafter revoked. That thereafter, on or about 16th August, 1881, the defendants took transfer of the said farm upon the conditions in the said deed set forth, and passed the bonds therein provided for—the said deed was duly registered and annexed to the transfer. The defendants enjoyed occupation of the said property in accordance with the provisions the said deed, which they adopted, and by which they became bound. That thereafter the estate of the said S. V. van Renen was surrendered as insolvent, on the 18th October, 1884, and thereafter all his rights in respect to the said donation, accepted as aforesaid, passed to the plaintiffs for the benefit of the creditors of his estate. That thereafter, on or about January 29, 1886, the said Frances M. J. Versfeld executed a second deed, whereby she purported to revoke the first deed and to dispose of the said farm and movable property upon new conditions, and thereby purported to give £1,600, instead of £3,000, to her said daughters, and to give the balance of the said £3,000 to the defendants. That thereafter on June 30, 1886, the said Frances M. J. Versfeld made a will in which she directed that the deed of January 29, 1886, should be taken to be portion of her will, and acted upon accordingly. That thereafter on or about 10th April, 1886, the said Frances M. J. Versfeld executed a codicil to the said will whereby she declared that the amount accruing to the said Mary van Renen under the said deed of

January 29, 1886, should be set off against a debt due to her, the said Frances M. J. Versfeld, by the said S. V. van Renen. That thereafter the defendants applied for an amended title to the said farm under Aot 7 of 1865, and on June 21, 1886, the said title was issued. That thereafter on or about August 16, 1887, the defendants entered into a partition of the said farm, took sub-divisional transfer, and passed bonds thereupon: the previously subsisting bond of £1,400 was passed upon each sub-division; the defendant F. F. Versfeld passed a bond for £1,900 in favour of his mother upon lot "A," and the defendant Jan W. J. Versfeld passed a similar bond upon lot "B," the said Frances M. J. Versfeld purported to cancel the former bond of £3,000; the defendants' continue in occupation of the said sub-divided portions. That there is an unsatisfied deficiency in the estate of the said S. V. van Renen amounting to £4,757 14s., and that the plaintiffs have never been consulted in respect of the acts and alleged dispositions of property above set forth, nor have they agreed thereto. That on or about the 21st April, 1891, the said Frances M. J. Versfeld died, and the defendants took out letters of administration as her executors under the said will. That the plaintiffs are entitled, on behalf of the estate represented by them, to the donation conferred upon the said Mary van Renen in the deed of 1881 referred to, and are entitled to have it declared that the subsequent deed, will, and codicil, and everything purporting to be done in pursuance thereof be, as regards them, declared invalid in so far as the same depart from the terms of the deed of August 16, 1881; but the defendants refuse to acknowledge the said deed, and have framed a liquidation account in which nothing is awarded to the plaintiffs, but the estate is distributed in terms of the deed of the 29th January, 1886, the will and codicil.

Wherefore the plaintiffs claimed:

(a) A declaration that they were entitled to the benefits conferred by the deed of August 16, 1881, and that defendants should pay over to them the sum of £1,000 due thereunder, together with one-third share of such arrear interest upon the bond of £3,000 as might be due.

(b) Further relief.

(c) Costs of suit.

The defendants in their plea admitted, *inter alia*, that they had refused otherwise to acknowledge the deed of the 28th July, 1881, than in so far as it was unaffected by the subsequent deed of the 29th January, 1886, and that they had as executors framed a liquidation account, in which nothing was awarded to the plaintiffs, but their mother's estate was distributed in accordance with her last will and the codicil thereto. They specially pleaded that in their personal capacity there was

no privity of contract disclosed between them and the plaintiffs by reason of the matters alleged in the declaration. Wherefore in their personal capacity they prayed that the plaintiffs' claim might be dismissed with costs. In their capacity as their late mother's executors they specially pleaded that they had performed their duties as such executors in accordance with her last will and the codicil thereto, and in accordance with their legal duty in that behalf. Wherefore in their capacity as executors of their late mother's estate they prayed that the plaintiffs' claim might be dismissed with costs.

Upon these pleadings issue was joined.

Mr. S. V. van Renen gave evidence that at the time the deed of 1881 was drawn up all the children, except Mrs. Rivers, resident in England, were present, and that what was done was regarded by the whole family as a final settlement of Mrs. Versfeld's estate. He considered the arrangement then made was fair, but the farm was worth more than set down in the deed. It was the most valuable farm in the Cape district, and he would guarantee to get £6,000 for it.

By Mr. Schreiner: The farm was valued for Divisional Council purposes at £2,000 in 1881. He did not know why that was. He was glad to say the Divisional Council had valued his farm at £500 for years. The farm Klaastenbosch had been in the Versfeld family for generations. It was farmed by the father of the present defendants and sold for £1,800 on his insolvency.

Mr. L. J. Cauvin, sworn appraiser, stated that he had valued the farm Klaastenbosch that day and considered it worth £6,000.

For the defence,

Mr. J. V. Versfeld deposed that under the original deed it was found impossible to make headway against the heavy interest. The farm was valued when taken over in 1881 at £2,000; a sub-division had since taken place, and the property had been greatly improved. The two properties were together assessed at £3,750 at the present time.

This concluded the evidence, and it was decided that the arguments should be heard before the full Bench.

Postea (March 9th) before the full Bench.

The argument in this case came on for hearing.

Mr. Searle, for the plaintiffs, contended that the deed of the 28th July, 1881, constituted a *donatio inter vivos*, which was accepted by Mrs. Versfeld's daughter (Mrs. Van Renen) and was irrevocable, and consequently the trustees in Mr. S. van Renen's estate were entitled to recover from the defendants (the executors under Mrs. Versfeld's will) the amount of the donation. Counsel further

contended that registration of a donation, although it exceeded £500, was not necessary as between donor and donee, and that an action could be brought to enforce a donation.

The following authorities were referred to in argument: Voet (89, 5, 4), Van Leeuwen's Commentaries (Vol. ii. pp. 286, 287), Grotius (3, 2, 12 and 18; 3, 2, 21), "Oliphant v. Grootboom" (8 E.D.C., 9), "Thorpe's Executors v. Thorpe's Tutor" (4 Juta, 488), "Elliott's Trustees v. Elliott and his Curator ad litem" (8 Menzies, 86), "Van Wyk v. Van Wyk's Executor" (5 Juta, 1), "Brink's Trustees v. Meeban and Others" (1 Roscoe, 299), "Malan and Van der Merwe v. Secretan, Beon & Co." (Foord, 94), Van der Linden (Book i., cap. 15, section 1), Van Leeuwen's Commentaries (Vol. ii., p. 287), Van Leeuwen's *Con. For.* (Para. I., Book ii., 8, 4), Voet (89, 5, 11 and 12), "Melok, Executor of Burger v. David and Others" (8 Menzies, 468), "Brink v. Meyer" (1 Menzies, 552), Voet (89, 5, 2 and 5).

The Court, without calling upon Mr. Schreiner, gave judgment.

The Chief Justice said that Mr. Searle had gone so fully into the authorities, and had so fairly quoted even those which appeared against him, that the Court was in a position to give judgment without hearing argument on behalf of the defendant. It had been decided, as part of the law of this country, that a contract would not be enforced unless it was supported by a consideration, but in all those decisions it had been recognised that a donation, even though no consideration had been given, would be enforced if it was clear that a donation was fully intended and completed. It was one of the exceptions to the rule that a contract required a consideration to support it. But it must be perfectly clear that the intention of the parties was that a donation should in point of fact be effected between them. In the present case there was no deed of donation executed at all by Mrs. Versfeld in favour of her daughters. The effect of the transaction between herself and her sons was to sell the farm to the latter, but incidentally, when they came to the question of how the purchase money was to be disposed of, there was an agreement made that a bond was to be passed by the sons in favour of the mother, the interest to be paid to her during her lifetime, and after her death the amount due on the bond was to go to her daughters, but it was clearly not the main object, at all events, of the parties to the arrangement to enter into a deed of donation by the mother to the daughters. It was an incidental matter, and he was satisfied that if Mrs. Versfeld had been asked whether she knew she was executing an irrevocable donation of £3,000 she would have said no. Her intention

was to sell the property to the sons, and she clearly reserved the right to alter the arrangement as to her daughters. In his opinion she had full power to alter that arrangement. There was no such acceptance as was required in cases of this kind, and there was no intention on her part to deprive herself of all right to dispose of £3,000 at some future time. That being the view of the Court, he thought it was unnecessary to go into the further question of registration, as to which there was some conflict of opinion and some reason for doubt. He should have thought it would be extremely unsafe in any case to rely upon a mere accidental registration such as took place in the present case. Where a deed of donation was entered into he thought the proper course was to adopt a form analogous to the form given in "Tennant's Notary's Manual." He thought there should be a written deed of donation by the donor, and an acceptance on the face of that by the donee, and he thought further that there should be a registration of the deed in the Deeds Office as a deed of donation, and it was extremely unsafe for parties to suppose that there was an irrevocable deed of donation unless these requisites were complied with. In the present case there was no formal mention of the word donation at all, and he was satisfied that the intention was not clear. The judgment of the Court must be for the defendants with costs.

Their lordships concurred, Mr. Justice Buchanan remarking that in his opinion there had been no such registration as the law required.

Plaintiffs' Attorneys, Messrs. Reid & Nephew;
Defendants' Attorneys, C. C. de Villiers.]

KLOPPER V. SMIT.

Joint will—Marriage in community—Sole and universal heirs—Massing of estate—Survivor—Usufruct—Vested interest—Inventory—Security.

Mr. Schreiner, Q.C., and Mr. Molteno appeared for the plaintiffs, and Mr. Searle and Mr. Webber for the defendant.

This was an action instituted by Andries Hendrik Kloppe, Barend Christian Kloppe, and Gert Myburgh (married in community of property to Jacomina Hendrina Kloppe), against Johannes Leopoldus Cornelius Smit, in his individual capacity, and as executor testamentary of the estate of Anna Cornelia Smit (born Kloppe).

The declaration was as follows:

1. One Anna Cornelia Kloppe was in her lifetime married with community of goods to the

defendant, Johannes Leopoldus Cornelius Smit, and died in October, 1890.

2. The defendant and his wife duly made and executed a joint will on the 5th day of November, 1887, which will is her last will and testament.

3. By the said will, written in the Dutch language, the testator and testatrix, after making certain bequests, proceeded therein to nominate and appoint as their sole and universal heirs in all their property at the death of the survivor, movable and immovable (with the exception of the said bequests), the two first-named plaintiffs, Jacomina Hendrina Kloppe (now married to the plaintiff Gert Myburgh, in community of goods), and five others in the words following: "De testatoren verklaren verder te benoemen en aan te stellen als hunne eenige en universele erfgenamen en al hunne met den dood van de langstlevende natalene goederen, roerende en onroerende (met uitzondering van de erfmakingen bovengemeld) Willem Petrus Smit, Jacobus Johannes Cornelius Smit, Engelsa Getruida Marguerita Smit, Andries Hendrik Kloppe, Berend Christian Kloppe, Aletta Maria Kloppe, Jacomina Hendrina Kloppe, en Jacoba. Marthina Myburgh, in gelijke deelen, en bij voeroverlijden van een of meerder hunner derzelver wittige afstammelingen bij representatie;" which in the English language has the meaning and signification following: "The testators declare further to nominate and appoint as their sole and universal heirs in all their goods (or property), at the death of the survivor, movable and immovable (with the exception of the bequests before mentioned), Willem Petrus Smit (and others above named), in equal shares, and in case of predecease of one or more of them, their lawful descendants by representation."

4. According to the true intent and meaning of the said will, the testator and testatrix intended to effect a massing of their entire joint estate, and a gift thereof over to the said heirs after the death of the survivor, and intended that the survivor should enjoy only the usufruct of the entire massed estate.

5. The survivor was appointed by the said will executor of the first dying, and the defendant has taken out letters of administration as such executor, but has failed and neglected to make an inventory of the property of the joint estate and transmit the same to the Master of the Supreme Court, in accordance with law, and to frame and lodge as required by law with the said Master a full and true account supported by vouchers, or any account, of his administration of his late wife's estate.

6. The defendant has also refused to accept and abide by the provisions of his wife's will in respect of the massing of the said joint estate as aforesaid, and has sold and disposed of most, if not all of the

assets of the said estate, and claims to retain his half-share thereof free and unburdened by the provisions of his wife's will.

7. By reason of the premises the defendant has forfeited the benefit of usufruct intended to be conferred upon him by his wife, in consideration of the massing of the said joint estate, and the plaintiffs are entitled to claim immediate payment by the defendant of their shares as heirs of the testatrix in respect of her half of the joint estate.

Wherefore the plaintiffs pray that the defendant may be condemned:

(a) To make forthwith, or cause to be made, a true and correct inventory of all property, goods, and effects, movable and immoveable, belonging to the joint estate of himself and his late wife, Anna Cornelia Smit (born Kloppe), and to transmit the same to the Master of the Supreme Court.

(b) To frame and lodge forthwith with the Master of the Supreme Court a full and true account, supported by vouchers, of the whole administration and distribution of the said joint estate.

(c) To pay forthwith to the plaintiffs respectively their shares of inheritance as heirs under his said late wife's will.

(d) Or that the plaintiffs may have such further or other relief in the premises as to this honourable Court may seem meet, with costs of suit *de bonis propriis*.

And for an alternative to the claim for payment forthwith of their shares, as heirs under the will of the defendant's late wife, and in case the contention embodied in paragraph 7 be overruled, the plaintiffs say that the defendant is, as usufructuary of the estate of his late wife the testatrix, by law bound to give good and sufficient security for the payment to them respectively of their said shares after the death of the defendant. Wherefore they pray, as an alternative to the prayer above marked (c), that the defendant may be ordered forthwith to give good and sufficient security for the payment to them respectively, after his death, of their shares as heirs of the testatrix, or that they may have such further or other relief in the premises as to this honourable Court may seem meet, together with costs of suit *de bonis propriis*.

The plea denied that the plaintiffs had a vested interest, and contended that the defendant was entitled to deal with the joint estate during his lifetime, on the condition that upon his death it reverted to the heirs under the will.

Mr. Justice Smith: What is the value of the estate?

Mr. Schreiner: About £7,000. The whole estate was to be converted into cash, and this gentleman (the defendant) has now married a young wife and claims to settle everything on her.

The defendant, Mr. J. L. C. Smit, was then called. He said that he married his present wife during 1891, and settled £7,000 upon her, the proceeds of the sale of the estate of himself and his first wife, and certain notes and cash in the estate.

This case was also set down for argument before the full Bench.

Postea (March 2nd) before the full Bench.

The arguments in this case were heard.

Mr. Schreiner: The question to be decided is purely one of construction. The defendant is a mere usufructuary, and cannot alienate. He was not appointed heir under the will. There has been a massing of the estate. He is bound to file an inventory and accounts. Counsel referred to the following authorities: "*Brown v. Rickard*" (2 Juta, 314) Sande, D. F. (5, 8, 4), Van der Kessel (Th. 320, 371-375), Voet (7, 1, 11), "*Rahl v. De Jager*" (1 Juta, 88), Grotius (Notes, 146, 148, 149), Van Leeuwen's Commentaries (vol. 1, p. 386, sec. 18), and authorities there cited, "*Castleman v. Stride's Executor*" (4 Juta, 28), "*Nortje v. Nortje*" (6 Juta, 9), Burge (C.L., p. 77, *Juta's Abridgement*), "*Watson v. Burchell's Executors*" (1 C.T.L.R., 296), "*Viljoen's Heirs v. Viljoen's Trustee*" (1 C.T.L.R., 218), Act 14 of 1864, sec. 8, "*Smith v. Executors of Sayers*" (Foord, 66). (A good deal of discussion took place as to the construction which ought to be placed on the word "*natalene*," which occurred in the will.)

Mr. Searle contended that practically there was no difference between the present case and that of "*Brown v. Rickard*," that the plaintiffs had no vested interest, and were only entitled to what was left of the estate after the death of the defendant who, as usufructuary, had the *dominium* inasmuch as it was not vested in anyone else. The following authorities were referred to: Van Leeuwen's Commentaries (Bk. 8, 8, 9), Voet (86, 1, 56), Sande (5, 1, 2).

The Chief Justice gave judgment. His lordship said that the will which the Court was called on to construe was certainly very obscure, but the Court must, with the means at its disposal, try and arrive at the true meaning of the testators. The cases cited that day did not assist the Court materially. In the case of "*Brown v. Rickard*," the testators had appointed the survivor the sole heir, and the Court came to the conclusion as that was the case the *dominium* of the property was intended to be in him, that he had the power of disposal, and that, inasmuch as he was bound to pay over to the heirs nominated with him only so much as should be left at his death, he could alienate the property. In the present case the only appointment of heirs was that of the plaintiffs. The survivor was not mentioned at all, but from the single word "*natalene*," which really

meant nothing, the Court was asked to say that the testators appointed the survivor the sole and universal heir, with full power. In his opinion, that construction was wrong. The plaintiffs were the only persons nominated as heirs. Mr. Searle asked the Court to say that the original words of the will meant that the plaintiffs should be heirs to all the goods that should be left at the death of the survivor, but they might also mean all the goods of the testators and such goods as should be left upon the death of the survivor. The will was just as capable of one reading as the other. It was extremely obscure, but in his opinion the fact that these plaintiffs had been appointed the heirs justified the Court in concluding that the testators intended that the *dominium* should be in them, and only subject to a usufruct in favour of the survivor. If that were correct, it was clear that defendant was not justified, after his wife's death, in disposing of the whole of the property. The Court would order the defendant forthwith to prepare a true and correct inventory of the goods in the joint estate, and transmit the same to the Master of the Supreme Court; that within four weeks from that date he elect whether he would take his half-share of the joint estate and pay the remaining half-share to the heirs appointed under the joint will, or retain the whole estate, giving security, however, to the satisfaction of the Master of the Supreme Court for the due payment to the plaintiffs of their share at defendant's death, the defendant, within four weeks of such election, to furnish a full and true account, supported by vouchers, of the whole administration and distribution of the said estate. As to costs, the Court was of opinion that, under all the circumstances, they should be costs in the joint estate. Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. Scanlen & Syfret; Defendant's Attorney, J. W. Sauer.]

SUPREME COURT.

THURSDAY, FEBRUARY 25.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

DELL V. THE COUNTESS DE MONTMORT.

Mr. Sheil moved for provisional sentence for £1,060, with interest at 6 per cent. from January 1, 1887, due on two promissory notes.

Provisional sentence was granted.

BOONZAISER'S EXECUTORS V. FATIMA.

Mr. Molteno moved for judgment for £28 4s. 4d., due on a mortgage bond.

The order was granted, and the property declared executable.

PRINCE V. KLOSSER.

Insolvency—Act 38 of 1884, Sec. 3—Proof of insolvency—Provisional order discharged.

Mr. Searle moved for final adjudication of the defendant's estate. The petition was presented by H. J. C. B. Prince, South African manager of the Dutch Trading Company. From the affidavit of petitioner it appeared that Klosser was the agent of the company in Cape Town, and that he bought all the goods of the local branch, upon condition that the purchase price should be the amount found to be due to the head office on December 31, 1890. The purchase price was fixed at £12,526 14s. 8d., and it was agreed that a general bond should be passed to secure payment. The bond not having been passed, an agent of the company came to Cape Town to see to the passing of it, and it was eventually passed for £10,884 8s. 6d. At the same time—in January, 1892—Klosser furnished the company's agent with a statement showing that the total value of his stock amounted only to £1,261 10s. 9d. Upon receipt of that statement the company was communicated with as to Klosser's financial position, and petitioner came down from Pretoria, under instructions from Amsterdam, to protect the interests of the company. It clearly appeared that while the said Klosser owed the company £10,884 8s. 6d., his total assets were only £2,215 2s., leaving a deficiency of £8,669 6s. 7d. Petitioner therefore submitted that Klosser was clearly insolvent.

Mr. Schreiner appeared for the respondent, and read his answering affidavit. From this it appeared that on January 14, 1891, when he was the Colonial agent of the company, one Walterus Dull, managing director of the company, called on him, and went through the books of the agency, which showed a great loss. Dull decided to give up the agency, and deponent agreed to purchase the interest in the agency, the purchase price being the amount due to the head office. That amount was £12,526, of which over £8,000 was lost. The arrangement was that he should pay £1,000 sterling, and instalments of £250 each at stated periods. The company agreed to supply deponent with goods, but had not sent all he had ordered, whereby he had been caused great loss. When the agreement was entered into the books showed a loss of £8,925, and in consideration of deponent taking over the agency with that burden

on it special terms of payment were agreed upon. His stock had not been dissipated, and was about of the same value as when he took it over. His business was now much better than it was then, and he had paid £250 ahead of the instalments due in addition to having reduced his liabilities by £1,765, and was ready to pay the other amounts as they fell due. He further believed that the applicant was acting without instructions, and against the spirit of the agreement.

Mr. Searle having read a further affidavit of the applicant,

The Chief Justice said it seemed that this man had paid far too high a price for the business, and that now the sellers wanted to take advantage of him.

After argument,

The Chief Justice said the Court had repeatedly said that if a creditor took out an order under the Act of 1884, he did so at his own risk, and would have to give clear proof of insolvency. In the present case the Court was not satisfied that there was that proof, and the order would therefore be discharged with costs.

Mr. Justice Buchanan added that if all the facts had been before him when the application in Chambers was made, the provisional order would never have been granted.

HETTNER V. JUBBER.

Mr. Castens moved for the final adjudication of the defendant's estate.

The order was granted.

COLONIAL ORPHAN CHAMBER V. BASSON AND OTHERS.

Mr. Watermeyer moved for provisional sentence for £196, less £12, being interest for two years on a bond, and also for £18 8s., for fire insurance premiums paid on behalf of defendants.

The order was granted.

TAIT V. HUGO.

Mr. Castens moved for judgment for £45 8s. 6d. The order was granted.

BACHMANN V. SCHUNKE.

Mr. Molteno moved for judgment for £57, with interest.

The order was granted.

BALL AND BROWN V. SCHUNKE.

Mr. Molteno moved for judgment for £24 6s., for board and lodging supplied.

The order was granted.

REHABILITATIONS.

The Court, on motion from the bar, granted the rehabilitation of Joseph Hermanus Mays.

GENERAL MOTIONS.

IN THE INSOLVENT ESTATE OF FERDINAND WALDER.

Mr. Watermeyer moved for the issue of a commission for the examination of the insolvent, his wife, and son, concerning their dealings with the trade and matters of the estate, and an order for the surrender to the commission of all books and documents relating thereto.

The order was granted.

IN RE PETITION OF THE BOARD OF EXECUTORS.

Edictal citation—Practice—273rd Rule of Court—Personal service—Publication in the *Gazette*

Where personal service has been effected under the 273rd Rule of Court publication in the Gazette is unnecessary.

Mr. Schreiner moved for the attachment *ad fundandam jurisdictionem* of this Court of certain saltpan, situate at Noord Heek, in the Cape Division, measuring 65 morgen and 885 square roodes, in an action to be instituted by petitioners against the executrix of the estate of the late Pierre J. F. Roohet for the recovery of the amount of two mortgage bonds, and for leave to sue by citation. Counsel referred to the 273rd Rule of Court, and raised the point of whether, where personal service had been effected, it was necessary to publish the citation in the *Gazette*. He said that on a recent occasion where the citation was served personally it was estimated that if publication had been made in the *Gazette* an expenditure of £12 would have been incurred.

Mr. Justice Smith: For an advertisement which nobody ever reads.

Mr. Schreiner: Quite so. A perfectly useless expenditure. The matter has been much discussed in the profession, and I would like your lordship's ruling upon the point.

The Chief Justice, after reading the rule, said he was glad counsel had mentioned the matter, because up to that time he had been under the impression that publication in the *Gazette* was necessary as well as personal service. Addressing the Registrar, His Lordship said that in future publication in the *Gazette* would not be necessary where there was personal service.

The order was granted, no publication in the *Gazette* provided personal service were effected,

THE CHAIRMAN MALMESBURY PUBLIC SCHOOL V. ROUX AND OTHERS.

Public School—Board of Management—Succession—School property—Devolution on New Board—*Locus standi* of Chairman—Interdict.

Mr. Schreiner moved to make absolute the rule nisi interdicting the respondents from alienating or otherwise dealing with the school furniture and benches, as well as the arrear moneys of the late School Committee.

Mr. Searle appeared for the respondents, and opposed the application on the ground that the old committee had now no control whatever over the school or the acts of the present governing body of the school. What happened was that the old Board of Managers was dissolved, and that upon that the guarantors assembled and decided to assume possession of the school furniture, which was their own.

Mr. Justice Smith: How can the school furniture be vested in the old guarantors?

Mr. Searle: How can it be vested in the new committee is rather the question.

The Chief Justice: If the guarantors were entitled to the furniture there would simply be a scramble every three years, when one body retires and another is elected.

Mr. Searle: That appears to have happened here.

Mr. Searle, for the respondents, contended that the present applicant, the chairman of the new Board of Management, had no *locus standi*, as there had been no vesting in the new Board, nor was there a succession from one Board of Management to another. Counsel referred to the Education Act 18 of 1865, sections 1 and 8.

Mr. Justice Smith: Have you read section 8, Act 8 of 1878?

Mr. Searle read the section, but submitted that it had no bearing on the present case.

The Chief Justice, without calling on Mr. Schreiner, gave judgment. His lordship said it had been more than once pointed out that there was a very serious defect in the Colonial school system, inasmuch as there was no provision for the perpetual succession of boards of management to school property. That defect was pointed out by a Commission on Education some years ago, and recently, again, by Sir Langham Dale; but the question in the present case was not so much whether in law there was a perpetual succession to property, as whether, under all the circumstances of the case, the Court would be justified in assuming that there had been a devolution of the property to the present Board of Managers at Malmesbury. He was perfectly satisfied that the respondents were not entitled to the property now

in question. They were guarantors, who had been called upon to pay a portion of their guarantees for two previous years, but they had no right to dispose of the property bought with the School Board money. The property belonged to the Board of Managers, and they, and they alone, had the right to dispose of it. They omitted, however, to make a clear provision as to what was to become of this property after their term of office expired, but in the absence of any such provision he was satisfied that the presumption was that they intended to pass the property to the new Board. The school was continuing; it was the same school; and in his opinion all the property that belonged to the school passed on to the new Board. There might not have been an absolute delivery to the new Board, but that defect did not debar the applicants from making the present application. The present applicants had sufficient *locus standi* to prevent the respondents from dealing with this property, and in his opinion the rule *nisi* already granted ought to be made absolute, with costs. His lordship added the expression of his hope that there were few other guarantors in the Colony who would take the course of the respondents in the present case. That course, in his opinion, argued an utter want of public spirit on their part. Because they were not elected members of the new Board of Management they decided to apportion among themselves property which in all justice and fairness ought to have gone to the new Board to allow of the school being carried on.

Mr. Searle asked if the judgment went so far as to say that the property absolutely belonged to the new Board, or was confined simply to the terms of the petition.

The Chief Justice said that the Court had practically decided that the property belonged to the new Board of Management, but if the respondents wished to go to further expense they could do so

SUPREME COURT.

FRIDAY, FEBRUARY 26.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

IN RE CONWAY: A LUNATIC.

On the motion of Mr. Giddy, the record in this case and the order of the Court were amended by altering the name of the lunatic as it appeared on the record from that of Robert James Conway to James Robert Conway.

IN RE INSOLVENT ESTATE OF S. NICHOLSON.

On the application of Mr. Graham, Mr. William Watt Pringle, of Kokstad, was appointed provisional trustee in the above estate.

DAY V. BRINK.

Bicycle — Collision — Alleged negligence — Action for damages.

Mr. Molteno for plaintiff; Mr. Graham for defendant.

This was an action instituted by Albert H. Day, a clerk in the General Manager's Office of the Cape Government Railways, and also a teacher of the violin, against one Andrew Brink, farmer, of Stellenbosch. The declaration stated that on November 7 last plaintiff was riding his bicycle down Darling-street, Cape Town, when a collision occurred with the defendant's cart, by which plaintiff was injured, and his bicycle damaged beyond repair. Plaintiff therefore claimed £50 damages. Defendant pleaded that the accident was due to the action of the plaintiff himself, and was in no way owing to the defendant.

Plaintiff (examined by Mr. Molteno) stated that he was a clerk receiving £144 a year. He was also a teacher on the violin. On November 7 last he was riding down Darling-street between one and half-past one in the afternoon. He was on his bicycle, and was going to Woodstock. He was on the left-hand side of the road, which was his right side. He was going at a moderate pace, ringing his bell. When he was crossing Grave-street he saw the defendant, who was then six yards away. He was going at a full trot, and witness turned out of the way into Lower Grave-street. As he turned defendant did the same, in the direction of the Parade, and the shaft pole of the cart struck witness on the right side and threw him to the ground. He attributed his escape to the fact that the violence of the collision was so great that he was thrown clear of the wheels. The bicycle became entangled among the legs of the horses, and it was dragged some yards. Witness was stunned, and his bicycle smashed. At the time of the accident defendant said something about settling the matter, but had not done so, and witness therefore instituted the present action. The bicycle cost £25, and was almost new. Witness assessed his damages at £50.

By Mr. Graham: He had ridden a bicycle two or three years in London and some months here. There were two men in the cart. If they had pulled up witness would have had time to get out of the way. He turned towards the station from Darling-street, and at the same moment defendant also turned, overtook him, and the pole struck his

side. It was impossible to turn a bicycle in six yards. He thought it took twelve yards. He did not try and pull up, because if he had done so he would have been in danger. On the 17th he advertised for witnesses in the *Cape Times*. He got no answers.

W. C. Goslett, cab proprietor, said that he was opposite Messrs. Fletcher's, in Darling-street, when the accident occurred. He saw Day going along on his right side, and Brink coming at a full trot on his wrong side. Brink drove down Grave-street, and just at the corner the cart caught Day and knocked him down. He considered that if Brink had not whipped up his horses the accident would not have happened.

By Mr. Graham: He only saw Day a few moments before the collision. He would swear that Brink whipped up his horses just before the accident happened.

James Greeber, cart-driver, deposed that he was standing in Darling-street on the day in question. He saw the cart near the Masonic Hotel, on the wrong side. Brink was coming along at a stiff trot, but Day was going slowly. Just as the corner of Grave-street was reached the driver touched the horses up, and the cart dashed into the bicycle. In his opinion the accident was caused by Brink.

By Mr. Graham: Both turned at the same moment.

For the defence,

Mr. Andrew Brink, the defendant, said that he had driven a cart for thirty-five years, and had never met with an accident before. He was driving along Darling-street, going to the Fish Market, driving at a short trot. He did not lash his horses close to the corner of Grave-street. He saw plaintiff coming along, and pulled up as hard as he could, but before he could succeed the bicycle collided with the cart. Witness turned before the bicycle did. Witness was not on the wrong side; he was in the middle of the road.

Mr. A. J. de Waal, a farmer who was in the cart with the defendant, denied that Brink drove fast or whipped his horses. Just before Grave-street was reached a cart passed in front of Brink, and directly afterwards the bicycle rode into defendant's cart as he was turning down Grave-street.

Mr. A. Z. de Beer, clerk at Cleghorn & Harris's, said he knew neither of the parties to the case but saw the accident from the pavement. He was watching the bicycle, and saw that although the cart had already turned the bicycle went straight on. Brink tried to pull up and did what he could to avoid the accident. Defendant did not say he would settle the matter, but that he would come in on the following Saturday and see how plaintiff was getting on.

After argument,

The Chief Justice, in giving judgment, said that from the evidence the defendant was crossing the

tramway line, as he was entitled to do, in order to reach the Parade. As he was crossing, the bicycle came on at a distance of about six yards, and the rider (the plaintiff) was apparently looking down on his bicycle instead of looking round to see what carts were coming along. Suddenly he saw the cart, and turned in the same direction as the cart itself towards Grave-street, although he was going in the direction of Woodstock. The result was that he drove into the horses, and now he claimed damages as if the horses had been driven into him. In his opinion plaintiff could have prevented the accident by going on the other side, and could not now succeed in his action.

Mr. Justice Smith said that, in his opinion, the defendant had been guilty of culpable negligence. No doubt a bicyclist had to exercise great care in the public streets, but at the same time he had his rights, and was entitled to be in the streets. It was proved that plaintiff was a skilful and experienced rider, and that whereas he was on his right side the defendant was on his wrong side. The evidence on the part of the plaintiff was that defendant was not only on his wrong side, but that he sharply turned the corner. In his opinion there was no contributory negligence, and he was inclined to give the plaintiff £25 and his costs.

Mr. Justice Buchanan said the question was a jury one, and the utmost, he thought, that the evidence had disclosed was that the affair was a pure accident, for which neither party was to blame. It was sufficient to find that the defendant was not liable for the accident, but if one went further the impression left on his mind was that it was due rather to the plaintiff than the defendant. Judgment was given for the defendant with costs.

[Plaintiff's Attorney, D. Tennant, jr.; Defendant's Attorneys, H. P. du Preez.]

GENERAL MOTIONS.

IN THE MATTER OF THE MINORS JOUBERT.

Mr. Searle moved for the sanction of the Court to the repudiation, on behalf of the said minors, of their right to certain share in landed property, situated in the district of Swellendam, bequeathed to them in the estate of their late grandfather.

The order was granted, subject to the consent of the Master.

PETITION OF ANDREW D. UDEMANS.

Mr. Graham moved for leave to sue *in forma pauperis* in an action by defendant against his wife for divorce by reason of her adultery.

The matter was referred to counsel for his certificate.

IN RE THE PETITION OF THE PORT ELIZABETH
DIVISIONAL COUNCIL.

Mr. Sheil moved that the rule nisi already granted be made absolute.

The order was granted.

SMITH AND CARTER V. VAN STADEN.

Resident Magistrate—Judgment—Notice of appeal—Refusal to forward record to registrar—Act 20 of 1856, Schedule B, Rule 59—*Mandamus*—Costs *de bonis propriis*.

Mr. Molteno, in putting in a consent-paper in this matter, referred to the action of the Resident Magistrate of Matatiele in refusing to forward the record in the case to the Registrar, as he was required to do by rule 59, schedule B, Act 20 of 1856. In consequence of this refusal a special application had to be made to the Court for a *mandamus* to compel the Magistrate to do his duty, and in respect of this application counsel asked that on the authority of "*O'Keeffe v. Scott*" (2, H.C.R., 329), costs should be given against the Magistrate *de bonis propriis*.

The Court ordered the Magistrate to pay the costs of the application of the 8th December last.

SUPREME COURT.

MONDAY, FEBRUARY 29.

[Before the Chief Justice (Sir J. H. DE VILLIERS, K.C.M.G.), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

BATTENHAUSEN V. SWART.

On the motion of Mr. Jones, provisional sentence was granted on a mortgage bond for £445 with interest.

MURRAY AND ST. LEGER V. ARMOUR.

Mr. Searle moved for a decree of civil imprisonment against defendant on a return of *nulla bona* in respect of a judgment in the Resident's Magistrate's Court, confirmed on appeal, for £85 12s. Defendant appeared in person, and said he was brought out from England by Messrs. Murray &

St. Leger, who advanced him money, but soon dismissed him as being incompetent. He then obtained a situation at Messrs. Richards & Sons, and was shortly made foreman.

Defendant, going into the box, said he only earned £2 7s. 6d. a week, and he could not pay. He had not paid a penny off the judgment at present. He had no property.—Decree granted, execution to be stayed on payment of 15s. a month, from 1st March.

HALL'S ASSIGNEES V. THERON.

On the application of Mr. Jones, provisional sentence was granted on two promissory notes for £80 9s.

LUND V. LOUW.

On the motion of Mr. Searle, the provisional order for sequestration was discharged.

LEAF V. LEVYNO BROS., GEO. LEVYNO AND LEWIS LEVYNO.

On the application of Mr. Molteno, the final adjudication of the defendants' estates was granted.

CAPE OF GOOD HOPE SAVINGS BANK V. BASSON.

Mr. Molteno moved for provisional sentence on a mortgage bond for £3,000 with interest.—Provisional sentence granted and property declared executable.

PELSER V. VAN DER LINDE.

Mr. Graham moved for judgment under Rule 819 for £58 14s. 7d. and costs.

It appeared from the return that process had been served on defendant's partner in the Transvaal and this service the Court held sufficient.

Judgment was granted, and property declared executable.

BINDER V. HOON.

On the motion of Mr. Molteno, provisional sentence was granted for £4 5s., balance of account.

LORAINÉ V. POTTER AND BELLEW.

Arrest—Writ—Confirmation—Security—Entering of appearance.

Mr. Schreiner, Q.C., appeared for the plaintiffs, and Mr. Searle for the defendants.

Mr. Schreiner moved for confirmation of the writ of arrest granted against the defendants on Wednesday last.

Mr. Searle read the affidavit of Mr. T. V. Twinning, business manager for the defendants, which stated that he held their general power of attorney, and that it was his intention to dispute the claim.

Mr. Searle went on to question if a defendant who had given security before the return day was bound to enter appearance.

Mr. Schreiner contended that the defendants were bound to enter appearance. The security had only been given that the defendants would appear to-day, and the plaintiffs had no guarantee that appearance would be entered subsequently. Mr. Twinning had stated that he held defendants' power of attorney but no one had seen the power, and it would be quite open to Mr. Twinning to say he would not enter appearance.

Mr. Justice Buchanan: Have you entered appearance, Mr. Searle?

Mr. Searle: No, but as we have given security I contend there is no necessity to enter appearance. The course now for the plaintiffs is to pursue the matter in the form of an action by filing pleadings. Counsel referred to the case of "Ryan v. Abrams (Buch., 1878, 93)."

Mr. Schreiner said the present case was different to Ryan's. Here a surety had signed, and unless something were done to confirm the writ, the surety might be released.

The Chief Justice remarked he was afraid a good deal of unnecessary costs were being incurred. The defendants having provided security, why not let the writs stand in the form of ordinary summonses?

Mr. Schreiner said Mr. Beit, the surety, was out of jurisdiction, and if the plaintiffs did nothing the defendants would not enter appearance.

The Chief Justice: But by their bail bond, the defendants agreed to enter appearance and abide the judgment of the Court. Why should not the writ be a summons?

After further argument,

The Chief Justice said that on principle he should have thought there was no necessity for confirming the arrest after the defendants had given security, as in the present case, but he was informed by the Sheriff that the invariable practice under similar circumstances had been to apply for confirmation of the arrest, and he found in the case of "Ryan v. Abrams," that there was an appearance entered by defendant. In the absence of any appearance being entered in the present case, the Court was opinion the ordinary practice should be adhered to, but it would be a question for the Court to consider whether a new rule should not be framed to meet a particular case like the present, to obviate also the unnecessary ex-

penses incurred in confirming the arrest, after security had actually been given. The Court must confirm the arrest, the question of costs to be reserved.

REHABILITATION.

On motion from the Bar, the Court granted the rehabilitation of Barend Frederick Beukes.

HOPKINS V. HOPKINS.

Mr. Schreiner appeared for the plaintiff.

This was an action brought by Mrs. Hopkins for restitution of conjugal rights.

Martha Ann Hopkins testified that she was married to defendant at St. George's Cathedral on 19th February, 1879. There were three children of the marriage. Her husband suddenly left home in February, 1884, and she afterwards heard he was in Adelaide, South Australia. She had written to him, and had received replies. Witness was now in a situation and her mother took care of the children, the eldest of whom was thirteen years and the youngest nine. There was no property in the estate.

Decree granted, the defendant to return to or receive the plaintiff on or before 15th July next.

DIPPENAAR V. DIPPENAAR.

Mr. McLachlan appeared for the plaintiff. This was an action for restitution of conjugal rights brought by the plaintiff (the husband) against his wife. Plaintiff in his evidence stated that his wife was living with her mother in Graaff-Reinet, and had refused to return to him.

The Court granted a decree of restitution of conjugal rights, the defendant to return to her husband on or before the 1st May, or to show cause on the 15th May why a decree of divorce should not be granted.

RICHARDSON V. RICHARDSON AND DOLBEY.

Mr. Tredgeld for plaintiff. This was an action for divorce against the wife on the ground of adultery, and for damages against the co-respondent, Dolbey.

George Morrison Richardson, the plaintiff, said he lived on the Cape Flats. He was married to respondent in 1890, but latterly he had reason to doubt the fidelity of his wife, and could not live with her. On 3rd December last year he entered into a deed of separation with her. Since then she had not lived with witness. He had seen her out driving since then with Dolbey. There was a child born to witness and respondent before their marriage, now aged two years and nine months.

Respondent had never shown any care for the child. The co-respondent drove a baker's van for Attwell & Co. at Claremont.

William Richard Rymer testified to having seen Mrs. Richardson and Dolbey frequently together.

Alfred William Loader, a private detective, stated he was employed to investigate this case. He had seen Mrs. Richardson and Dolbey at a house at Claremont together. Mrs. Richardson had told him the house was rented by Dolbey, and no one else lived in the house but herself and Dolbey. He had watched the house, and had seen the respondent and co-respondent in a bedroom together.

The Chief Justice: I do not think it is a case for damages against the co-defendant. The plaintiff himself seems to have seduced this girl before the marriage.

Decree of divorce granted, with forfeiture by respondent of all rights by the marriage in community, plaintiff to have custody of the child, and co-respondent to pay costs.

NEL AND TIRAN V. LIND AND TIRAN.

Mr. Searle, on behalf of defendants, confessed judgment for £1,000 with costs. Mr. Schreiner and Mr. Tredgold (the *curator ad litem*) consented.

Judgment was accordingly entered for plaintiffs for £1,000, and for £40 on the claim in re-convention.

BROWN AND HIS TRUSTEE V. GREEN.

Mr. Schreiner moved for judgment for the defendant, in terms of a consent-paper put in, with costs, including the costs of the argument on exceptions.

Judgment was entered for the defendant.

IN RE HUTTON.

On the motion of Mr. Graham, Mr. Herbert Beever Hutton was admitted as a conveyancer.

ASHBURNER V. RYAN.

Messenger of the Court—Trespass—Alleged unlawful seizure—Interpleader proceedings—Action—Damages.

Sir T. Upington, Q.C., and Mr. Sheil appeared for the plaintiff, and Mr. Moltano for the defendant.

This was an action instituted by Major-General Ashburner, of Knorhoek, in the division of Stellenbosch, against the defendant, the messenger

of the Periodical Court, Somerset West, for £50 damages, alleged to have been sustained by reason of his unlawful trespass.

The declaration alleged that the defendant, purporting to act in pursuance of a warrant directed to him under the hand of Henry Boase, issuer of process for the district of Stellenbosch, for the levy on the movable property of Frederick Jacobus Kotzé and Matcheld J. M. van Es of the amount of a certain judgment and costs, wrongfully and unlawfully and in the absence of the plaintiff broke and entered and trespassed upon the property of the plaintiff situate at Knorhoek, and wrongfully and unlawfully seized and took possession of, and laid under pretended attachment, certain goods of the plaintiff. That at the time of the acts referred to in the last paragraph the defendant had full notice that the goods so wrongfully and unlawfully seized by him were not the goods of the debtors, but were goods of the plaintiff which the defendant had no authority to seize or take possession of, yet the defendant persisted in his said acts. That thereafter, on or about the 29th December, 1891, the defendant with the notice aforesaid again wrongfully and unlawfully trespassed upon the said farm of the plaintiff, and broke and entered certain houses thereon, and forcibly removed the said goods and certain other goods of the plaintiff out of his custody and against his will, and deprived the plaintiff of the possession thereof, and detained the said goods for a considerable time, to the loss of the plaintiff.

The plaintiff claimed £50 damages and costs.

The defendant pleaded that in pursuance of a warrant directed to him he proceeded to the plaintiff's farm, where Kotzé and Van Es permanently resided, and in the absence of the plaintiff Kotzé showed him his room, and that he thereupon attached certain goods which were left in the possession of Kotzé. That thereafter the plaintiff claimed a certain portion of the goods attached, and interpleader proceedings were taken, and the goods claimed by plaintiff recovered by him. Defendant denied that plaintiff had suffered damages amounting to £50, or any part thereof, for which he (defendant) was liable.

Defendant specially pleaded that all he had done was done in a legal and proper manner, and therefore he prayed that plaintiff's claim might be dismissed with costs.

Upon these pleadings issue was joined.

Major-General Ashburner, the plaintiff, examined by Sir T. Upington, detailed the circumstances attending the seizure and alleged trespass.

Cross-examined: He first became aware of the attachment about December 14. Kotzé and Van Es had been on his farm since the 8th or 9th November. The former managed his farm. He had no recollection of being told that he could get

his things by applying at the Magistrate's Court. The affidavit which he made was on the strength of information which he had received. He bought the horses from Mr. Buissinne, who acted as agent for Mr. John van Es. He succeeded in the interpleader proceedings and got his personal expenses.

By the Court: Nothing of his was actually sold, but he considered he had suffered damage by the fact of his property being attached.

Mr. F. J. Kotzé stated that he was in the employment of the General. The defendant attached the General's property on the 14th December; he told defendant that he was attaching the General's goods, and that he (witness) had nothing in the house but a box of clothes. Witness told defendant that the horses and cart had never been his property, but defendant insisted upon attaching them. The defendant said nothing about Mrs. Van Es's property.

Cross-examined: He was defendant in the recent case of Kotzé v. Kotzé, but that had nothing to do with this case. Mrs. Van Es and he formerly farmed together. Mr. John van Es was not living with his mother; he worked in Cape Town. Defendant saw Mrs. Van Es on the day of the attachment, but did not speak to her. The arm-chair that was attached belonged to Miss Van Es, and the table to John van Es. He had often driven the horses and Ryan had seen him do so.

Mr. Buissinne, farmer, testified to making a *bona-fide* sale of the horses and an American farm-wagon to the plaintiff. He did not suppose the horses would have fetched more than £5 apiece if put on public sale, but they were in much better condition now. Witness effected the sale on behalf of John van Es. The spring cart belonged to Van Es, and was not, to witness's knowledge, purchased by General Ashburner.

This closed the plaintiff's case, and Mr. Molteno called the defendant,

Michael Ryan, who said he was messenger of the Periodical Court at Somerset West. He had a writ of attachment against Kotzé and Van Es. He saw Mrs. Van Es, and she said she had nothing. She referred him to Kotzé, who said he had nothing. Witness said he would attach the horses and a cart, and although Kotzé denied they were his property witness did not believe him, because he had seen him constantly working with them. The furniture which he attached in the room he had seen in Kotzé's place at the farm where Kotzé was previously living. Kotzé had previously told him that one of the horses was his own. Witness inquired for the General, but Kotzé said he had gone to Cape Town. Witness left the goods on the farm.

By the Chief Justice: I left no one in charge of the goods, and there was nothing to prevent the General using them. I left a copy of the inventory with Kotzé.

Sir T. Upington was heard for the plaintiff, and relied on the case of "Olivier v. Keating Foord, 102

Mr. Molteno, in reply, referred to "*In re Frisby*" (*Cape Argus*, 8th September, 1870), and *Dersley v. Wagner*, 5, E.D.C., 248.

The Chief Justice, in giving judgment, said if the contention for the plaintiff was correct, in every case in which a third party's property had been attached the third party could bring an action for damages against the messenger. He thought this was not the intention of the law, and the practice would be an abuse. In the present case he was satisfied that the messenger acted in a *bona-fide* manner, and that he had reason to believe the articles in question belonged not to the plaintiff, but to the defendants in the case of "Ghislin's Executors v. Kotzé and Van Es." He found the articles in the man's room, and had seen three horses in common use by him, so that he had every reason to believe they belonged to Kotzé. There was every opportunity given to the plaintiff to establish his claim before the Magistrate, and he did establish his claim, and now actually brought an action for damages for injury. What injury the plaintiff had sustained he (the Chief Justice) could not conceive. He could have used the horses if he liked. There was no cause of action in this case against the defendant. He agreed with the opinions of Mr. Justice Buchanan and Chief Justice Bell, in the two cases cited, to the effect that a messenger was not bound to take the word of the debtor, and that if he believed honestly that goods were the property of the debtor, he incurred no liability in attaching them. Judgment would be for defendant with costs.

Plaintiff's Attorney, H. P. du Preez; Defendant's Attorney, C. C. Silberbauer.]

KNOX V. KNOX.

On the motion of Mr. Castens, the rule *nisi* was made absolute for a decree dissolving the marriage subsisting between the parties by reason of the respondent's failure to obey the order of the Court for the restitution of conjugal rights.

PETITION OF GILL COLLEGE CORPORATION.

Sir Thos. Upington applied for an order declaring that certain members of the above body some of whom have been appointed in terms of the will of the founder and others under operation of a bye-law, are the corporation for the time being of the said society. The proposed new trustees were the Rev. J. M. Abrahams and Mr. R. Pringle, one of the old trustees being dead, and the other having vacated his seat. Counsel referred to Act 8 of 1878.

The Court granted the order,

PETITION OF BATTENHAUSEN BROTHERS.

On the motion of Mr. Jones, the rule nisi was made absolute for transfer under the Titles Registration and Derelict Lands Act, 1881, to petitioners of certain two lots of ground, situated in the village of Britstown, at present registered in the name of Lambertus P. J. van der Poel.

PIENNAAR V. PIENNAAR AND VAN RENSBURG.

On the motion of Mr. Webber, an order was granted for the removal of the suit instituted by the plaintiff against his wife for divorce, and against the co-respondent for damages, for trial at the Mossel Bay Circuit Court on the 21st March next.

In re THE CAPE OF GOOD HOPE BANK.

Mr. Schreiner moved for confirmation of the fourth report of the liquidators of the Cape of Good Hope Bank, presented at the beginning of last month.

Sir T. Upington, on behalf of a number of shareholders, presented a petition to protest against the remuneration being granted the liquidators upon the basis of their report, viz., at 1 per cent. upon the sums collected to the amount of a lump sum of £18,456. The petitioners held this remuneration was excessive, and alleged that for the work that remained the number of liquidators was needlessly great, and suggested that the number should be reduced, the cost of administration could thereby be materially lessened without, in the opinion of the petitioners, the efficiency of the liquidation being in any way impaired; further, that so far from the liquidators, with the exception of Mr. J. R. Reid, having had to lay all other business on one side, they had actually all retired from business.

Mr. Schreiner put in an answering affidavit from the liquidators which alleged that when they took over the bank there were fourteen branches open, and nearly all the employes were on the staff under contract; that they had since effected the closing of most of the branches, and reduced salaries from thousands to £190 a month, thus reducing expense all round. All the responsibility of the liquidation rested on the liquidators.

Mr. Schreiner further represented that the work of the liquidators was expected still to extend over five years. The present rate of remuneration meant far less reward to the liquidators than they would receive under any other form of administration of estates. The Winding-Up Act left to the Court the discretion of awarding remuneration to the liquidators. He did not quite hope to induce the Court to allow the large scale

adopted in insolvency cases, but when it was seen that these gentlemen would be engaged for five years, and took into account the amount of worry and trouble they would be subjected to, he trusted the Court would regard their request as a reasonable one.

The Chief Justice said he was bound to say the liquidators had done their work so far exceedingly well, and that if it had not been for their energies a great portion of the assets would not have been recovered. At the same time, he must say the amount of remuneration was large. While taking into account the amount administered, they could not lose sight of the fact that it was as easy to receive a cheque for £50,000 as one for £50.

Mr. Justice Buchanan thought a commission was much better than a salary system, as it afforded a better incentive to collect everything in.

The Chief Justice: Sir Thomas, have you any objection to the payment of £4,000 for the second year?

Sir Thomas Upington replied his clients alleged that £4,000 was only voted as the rate of remuneration for the first year. There was little labour now involved, except receiving outstandings in cheques.

The Court resolved to consider the question.

SUPREME COURT.

TUESDAY, MARCH 1.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

In re THE CAPE OF GOOD HOPE BANK, IN LIQUIDATION.

The Chief Justice said that with regard to the remuneration to the liquidators of the Cape of Good Hope Bank three courses had been suggested. The first was to pay the liquidators at the rate of 1 per cent. on the total amount of assets realised; the second, to take the end of the first year (September, 1891) and allow them 1½ per cent. upon all assets after that date, and the third, to continue allowing them remuneration by way of annual salary. As regards the first course, the amount would certainly be excessive, and he thought there was much force in the objection raised on behalf of shareholders and creditors that the amount would be too large. As to the second course, the Court had not sufficient data before it to know exactly what the amount of remuneration

would be if $1\frac{1}{2}$ per cent. were awarded on all assets realised after September, 1891, but from such data as the Court had it appeared that the amount would be £6,000.

Mr. Schreiner said it would be about £5,040. The assets realisable after September, 1891, would be about £836,898, and if the $1\frac{1}{2}$ per cent. remuneration were granted it would mean that the liquidators would be paid about £12,000 for five years' work.

The Chief Justice: Why should it be five years?

Mr. Schreiner said the work of liquidation would be a long business, seeing that estates had to be wound up and accounts closed.

The Chief Justice said he was going on to say that the third course seemed to be upon the whole preferable. The Court had commenced to give remuneration by way of salary. The duties during the second year had been as arduous and responsible as during the first, but the Court was quite satisfied that at the end of the second year the duties would cease to be arduous and responsible, and the Court could not hold out any expectation that anything like the rate of salary would be allowed after the second year. The Court thought that for the second year the remuneration ought to be the same as the first, namely, £4,900. The report would be confirmed in other respects.

Mr. Justice Buchanan added that he thought the shareholders and creditors ought to be encouraged to watch the liquidation as it went on.

Sir T. Upton applied for the costs of the objectors, which the Court allowed.

THE WELLINGTON BANK, IN LIQUIDATION.

Mr. Schreiner presented the final report of the liquidators of the Wellington Bank, and stated that the work of liquidation was practically finished. Shareholders would obtain a further refund of 8s. per share, and the liquidators asked for an order fixing their remuneration—£10 each was suggested—and for the dissolution of the bank and the destruction of the books and papers of the bank.

The order was granted.

IN THE ESTATE OF THE LATE CONRAD W. MEYER.

Mr. Schreiner moved for an order authorising the Registrar of Deeds to cancel certain mortgage bond passed by the executors of the said estate in favour of Louis F. Agron, in 1862, hypothecating certain house and premises in Cape Town, block 21, the said Agron having become insolvent in 1866, and no claim having been filed by his trustee in respect of the bond.

An order was granted, calling upon anyone interested to show cause why relief should not be granted.

UNION BANK V. JOUBERT'S EXECUTRIX.

Mr. Schreiner moved for an order amending the list of contributories by placing thereon the executrix of the said estate, and removing the name of the said Joubert, and declaring the estate liable for all the calls in respect of five shares, and the widow liable *de bonis propriis* for any deficiency on the same, to the extent of the sum distributed by her as executrix.

The order was granted.

In re VAN RENEN V. VAN RENEN.

Mr. Graham moved for an interdict restraining respondent from selling or mortgaging his landed property in Cape Town until he shall have given security for the due fulfilment of the judgment of the Court in the suit between the parties. Counsel reminded the Court that the application arose out of a recent divorce case, in which the respondent was ordered to pay the plaintiff £10 per month as alimony. The respondent had advertised his house for sale for that day, and the applicant had reason for believing that he intended evading the judgment of the Court.

Mr. Searle appeared for the respondent, and said that he had a large amount of other property, and had no intention to evade judgment. The house was bonded for £1,966, and would not bring more than £2,000.

After some discussion as to arrangement,

The Chief Justice said that in strictness the applicant was not entitled to any order, but the respondent had consented to an interdict with regard to another property, and the Court would grant an interdict restraining respondent from selling, mortgaging, or otherwise alienating his store, upon which a rental of £10 was payable, the respondent undertaking that the rent of that store should go to the applicant towards satisfying the judgment of the Court. There would be no order as to costs.

IN THE MATTER OF ROBERT HENRY CAFFYN A LUNATIC.

Mr. Graham applied for the appointment of a new curator to the said estate in the place of L. M. Caffyn, deceased.

The Court appointed the secretary of the Colonial Orphan Chamber curator of the property.

THE PETITION OF LANDMANN.

Mr. Searle moved for an order authorising the Registrar of Deeds to amend certain deeds of

transfer passed on the 17th August, 1874, in respect of the farm called Leeuw, in the district of Aberdeen, in favour of petitioner and three others, so as to make it appear that petitioner and two others each hold a third share of half the farm, and the fourth transferee the remaining half.

A rule nisi was granted, returnable on April 12. The Chief Justice remarked that the Court was inundated with these applications to amend transfers and conveyances, and it might be advisable to mulct some of the offenders in costs.

IN THE MATTER OF THE MINOR PERCY COWLING.

Mr. Moltene moved for leave to the father to raise a sum of money on mortgage of certain two lots of ground in Cape Town, at the Military Lines, belonging to the minor, for the purpose of erecting buildings thereon for the benefit of the latter.

The Court declined to grant the order, the Chief Justice remarking that the Court would not assist parents in this way to the possible detriment of creditors.

WOLHUTER V. LIBERMAN AND BUIRSKI.

Master and Servant—Salary—Action—Exception—Wrongful dismissal—Amendment of summons—Case remitted.

Mr. Graham for the appellant; Mr. Searle for the respondents.

This was an appeal from a decision of the Assistant Resident Magistrate of Robertson. It appeared that the appellant, plaintiff in the Court below, sued respondents for £8, for salary from January 1 to January 15, 1892, for service performed, and for £5 4s., for a further month's salary from January 15 to February 11, due by reason of wrongful dismissal.

The respondents (defendants in the Court below) pleaded to the first paragraph of the summons a tender of 18s. 8d. as and for the balance alleged to be due to plaintiff before issue of summons.

To the second paragraph they took exception, 1st., on the ground that the said paragraph was not in accordance with law; 2nd., that the action was premature and 8rd., that it was not alleged that the plaintiff was willing or had been willing to serve during the period claimed for in the said paragraph.

The Acting Resident Magistrate upheld the exception, and gave judgment for plaintiff for 18s. 8s., Plaintiff to pay costs. The following being his reasons: "In this case I sustained the second exception taken to paragraph 2 in the summons without entering into the first and third. I held this action to be premature inasmuch as it

was not brought in the form of an action for damages, but for salary, interest *a tempore morae* even being claimed. The Attorney for the defendants quoted *Chitty on Contracts*, 10th Ed., pp. 532, 533 and 536, according to which I was satisfied that the action in its present form was premature. No authority was quoted by the attorney for the plaintiff, and I was satisfied to give judgment as I did."

Mr. Graham was heard in support of the appeal.

Mr. Searle, for the respondents, pointed out that there was no allegation in the summons that the plaintiff was willing to perform his duties during the time specified. In any case the action should have been for damages. *Hunt v. H. P. Boating Co.* (8 E.D.C., 12). No application was made for an amendment of the summons. Counsel referred to Act 20 of 1856, Sec. 50.

The Chief Justice, in giving judgment, said that the plaintiff should have applied for leave to amend the summons. In strictness the Magistrate was right, and the appeal must be dismissed with costs, but the case would be remitted to the Magistrate for trial on its merits, with leave to the plaintiff to amend the summons.

[Appellant's Attorneys, Findlay & Tait; Respondents' Attorneys, Messrs. van Zyl & Buissinne.]

VAN DER BYL AND CO. V. FINDLAY AND KUHN.

Lease—Rent—Cession of rights by lessor—Collateral security—Right of Cessionaries unaffected by subsequent sale of property.

Mr. Searle for the appellants; Mr. Schreiner, Q.C., for the respondents.

This was an appeal from a decision of the Resident Magistrate of Worcester, in a case in which Messrs. Findlay & Kuhn, of Worcester, were sued for £12, being two months' rental for a house and store. The original lease was taken from a Miss Van Blerk, who, however, ceded all her rights in the lease to Messrs. Van der Byl & Co. as collateral security for a debt.

Subsequently at the instance of the second mortgagee the property was bought by the respondents (defendants in the Court below) from the lessor who thereupon cancelled the lease. Notice of the sale was given to the cessionaries, but when the next two months' rent fell due they (the cessionaries) demanded payment. The respondents (the vendees) refused to pay the rent, and in consequence proceedings were instituted against them for the recovery of the same.

The Magistrate gave absolution from the instance with costs, and from this decision the plaintiffs (now appellants) appealed.

The Magistrate gave the following reasons for his judgment: "The defendants contend in the

third paragraph of their plea that the lease in question was ceded to the plaintiffs by the lessor, Miss van Blerk, merely as collateral security for a debt due by her to them; and in paragraph 4 that upon the sale of the property (the subject of the lease) to defendants due notice thereof was given to plaintiffs' attorney, and yet that the principal debtor, Miss van Blerk, is not now before the Court either as co-plaintiff or co-defendant. Both these pleas appear to raise serious obstacles to the plaintiffs' present action. For in the first place the lessor could only cede to plaintiffs such rights as she herself possessed under the lease, and these she appears to have waived in favour of the defendants, when she agreed to sell the property to them, giving notice thereof to plaintiffs, through Mr. Oliff, at the same time. In the second place Miss van Blerk being the principal debtor and a party to the cancellation of the lease would if such cancellation afforded the plaintiffs ground of action, have been at least equally liable to them. It appears to me then that Miss van Blerk should necessarily have been joined as a co-defendant before any liabilities could be determined, and that the defendants should therefore have absolution from the instance with costs.

Mr. Searle was heard in support of the appeal and referred to *Green v. Griffiths* (4 Juta, 846).

Mr. Schreiner, for the respondents, said that the lease was simply ceded as collateral security, and contended that in reality there was no privity between the respondents and Van der Byl & Co. There was no contract, and Findlay & Kuhn were in the same position as if they had been verbally informed that Van der Byl & Co. had obtained Miss Van Blerk's rights. The respondents had bought the property from Miss Van Blerk in the full belief that so soon as the purchase was made they ceased then to pay rent upon the building. The lessees were under no legal duty to go and inquire if Van der Byl & Co. had been paid their claims upon Miss Van Blerk.

Cur ad vult.

Postea (March 15).

The Court gave judgment.

The Chief Justice said: This was an action for rent brought by the cessionaries of a lessor's rights against the lessees. The lessor was a Miss Van Blerk, who by a written lease, dated the 16th of March, 1891, leased certain premises to the defendants for a year certain at a rental of £6 per month, payable monthly. Being indebted to the plaintiffs in a sum of about £26, Miss Van Blerk, on the 21st of September, 1891, by endorsement on the lease, ceded and transferred all her right, title, and interest in the lease from that date to the plaintiffs as collateral security for the debt.

On the following day notice of the cession was duly given to the defendants, the lessees, who endorsed on the lease an acknowledgment of having received notice, and further undertook to pay the rent at the office of the plaintiffs' agent, instead of at the office of the lessor's agent. The defendants accordingly paid the two following months' rent to the plaintiffs' agent. In November, however, the second mortgagee of the property induced the defendants to purchase the property from Miss Van Blerk. The purchase price was to be paid to the mortgagees, and the understanding with Miss Van Blerk seems to have been that the lease was to be cancelled. Notice of the sale was given to the plaintiffs' agent, but when the next two months' rent fell due they again demanded it from the defendants. The question to be determined is whether they are released from their liability for the payment of the rent by reason of their having purchased the property and obtained a cancellation of the lease from the lessor. The Magistrate, against whose judgment the present appeal is brought, held "that Miss Van Blerk should necessarily have been joined as co-defendant before any liabilities could be determined, and that the defendant should therefore have absolution from the instance with costs." But the question which I have stated could be determined without making Miss Van Blerk a party to the suit. She has parted with all her rights in respect of the lease, and she could not possibly be prejudiced by a judgment for rent being given against the defendants. On the contrary, such a judgment would *pro tanto* diminish her indebtedness to the plaintiffs. If the Magistrate meant that, because the cession was by way of pledge or collateral security only, an exoneration of Miss Van Blerk, as original debtor, was required before her debtors, the defendants, could be sued by the plaintiffs as pledgees, we have the express authority of Voet (20, 1, 17), founded upon decided cases, that such exoneration is not necessary. Until the debt for which the original security was given has been paid the plaintiffs are entitled to all the rights of cessionaries. It is not suggested, much less proved, that the debt ever was paid, or that the defendants, before they purchased the property, had reason to believe that the debt had been paid. In the recent case of "*Wright v. Colonial Government*," the debt due to Firbank, Pauling & Co. by the Colonial Government had been assigned by the former to Wright & Co. as security, and the Court held that Wright & Co. could sue the Government, although Firbank & Co. were not parties, and had not first been exonerated. Coming then to the main question, we find that in September, 1891, Miss Van Blerk parted with all her right, title, and interest in the lease in favour of the plaintiffs. Before the cession she had the right to agree to a cancellation

of the lease, but she parted with that right, just as she parted with the right to receive the rent, after she made the cession. If no notice of the cession had been given to the defendants, they could have made a valid payment of any rent accruing due to the lessor herself, but after such notice payment to the lessor would not discharge them from liability to the plaintiffs as concessionaries. The difficulty which I have felt in this case is as to whether notice of the cession also prevents them from obtaining a discharge of their liability by entering into an agreement with the lessor for the cancellation of the lease. There is a remarkable lack of authority on this point. The opinion of *Sande* (De Cess. Act, 9, 2 and 8) is clear to the effect that, so far as the rights of the cedent are concerned, they are completely transferred to the cessionary, so that he only can enter into any valid agreement with the debtor for his discharge from further liability. If the defendants in this case could not make a valid payment of rent to Miss Van Blerk they ought not, on principle, to be allowed to obtain the benefit of an arrangement by which she placed it out of her own power to claim payment of the rent during the further currency of the lease. The fact that the defendants have purchased the property does not place them in a better legal position. They purchased it with full knowledge of the plaintiffs' rights, and those rights they could have protected by stipulating that they should be allowed, during the remainder of the term, to pay the rent to the plaintiffs and deduct the amounts so paid from the purchase money. If the mortgagees had objected to this course they might have protected themselves by bringing an action to set aside the lease, or in the manner indicated by the Court in the case of *"Dreyer's Trustee v. Lutley"* (8 Juta, p. 59), but to such an action it would have been necessary to make the plaintiffs, as cessionaries of the lease, parties. Without their knowledge or consent the lease was cancelled and the land sold to the defendants. In my opinion the plaintiffs could not in this manner be deprived of their right to rent for the unexpired term of the lease. The defendants are, of course, entitled to the benefit of any defence arising out of the terms of the contract of lease which they would have had as against Miss Van Blerk herself, but in the absence of such defence they must pay to the plaintiffs the rent which under the lease they would have been bound to pay to Miss Van Blerk. The appeal must therefore be allowed with costs, and judgment entered for the plaintiffs with costs in the Court below.

[Appellants' Attorney, C. C. Silberbauer; Respondents' Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

WEDNESDAY, MARCH 2.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

REGINA V. HLAWE.

Diamond Trade Act—48 of 1882, Sec. 3—
Contravention—Conviction—Appeal.

Mr. Searle for the appellant; Mr. Giddy for the Crown.

This was an appeal from a conviction of the accused by the Special Court of Kimberley, on a charge of contravening the Diamond Trade Act of 1882: The appellant and another native named George were indicted for buying and dealing with a rough and uncut diamond by way of barter, pledge or otherwise, either as principals or agents, and that the said transactions took place with one Isaac Phineas and George Donelly, or one or either of them, both natives in the employment of the Kimberley Detective Department. The prisoners were found guilty, and the appellant sentenced to five years.

H. L. Donelly gave the following evidence at the trial:

On the evening of January 4th last I went to the house of Isaac with detectives Brink and R. Chadwick, the latter searched me. Brink gave me a rough diamond (same as produced). The detectives hid themselves under the bed. Isaac was not there then. Prisoner George came in with his wife; he said he had been in before and went away as we were not there. He asked me if I had the diamond. I said yes. Isaac had then just come in. I showed prisoner George the diamond. He examined it and said it was spotted and cracked. On further examination he said it was a good stone. He said he would go and get his "baas."

He left his wife remaining. Isaac went with him, they returned with prisoner William (Hlawe). Prisoner George said something. Prisoner William came up and asked if I had it. I said yes, and showed him the diamond. He asked me what I wanted for it, I said £3. He agreed and went to the door and asked me to come outside. I refused. He then said he would give me £1 then and £2 next morning. He asked me to go to his house. I refused. He told me to give Isaac the diamond to go with him to his house. He and Isaac then went to get change.

They returned in about twenty minutes. While they were absent George said I was a fool to charge William £8 for the diamond as it was worth £10. George said if William bought the diamond he must get something. I promised him 10s. Before William and Isaac returned prisoner George and his wife left. William on returning with Isaac asked where George was. I said he had left. He asked me if I still had the diamond. He put his hand in his left-hand trousers' pocket as if to take out the money to pay me. Meanwhile he picked up the bed-clothes which hung down, saw Chadwick under the bed, shouted and ran away.

He did this (lifted the bed-clothes) with a sjambok in his right-hand and at the same time I saw a sovereign in his left hand. He was arrested next day. I returned the diamond to Brink.

This evidence was corroborated by the other witnesses.

Mr. Searle, in support of the appeal, contended that there had been no concluded sale, as there had been no delivery of the diamond to the prisoner, nor had any money passed.

Counsel referred to Sec. 8 of the Act and submitted that there had been no contravention of the section. Reference was also made to the case of the Queen v. Farley (2 Juta; 227).

Mr. Giddy was heard in support of the conviction.

The Chief Justice, in giving judgment, said that the question which the Court below had to determine was whether there had been a completed contract of sale. If the case had been a civil one, and the Court below had held on the evidence that there had been a contract of sale, and that damages were recoverable by reason of breach of contract, the Court would not have dreamt of disturbing the verdict, because there was sufficient evidence to justify the Court below in deciding that a sale had taken place. There had been an agreement as to the sale, the price, and the mode of sale, and the diamond was really sold for £8, £1 to be paid at once, and £2 on the following day. There was evidence that before the parties were disturbed the defendant was seen to take a sovereign out of his pocket, which showed both a sale and an intention immediately to pay part of the purchase price. It was said that there was a difference between criminal and civil cases, but after all, what the Court had to be satisfied about was that the offence had been committed. He thought the Court below was right, and that the appeal must be dismissed.

Their lordships concurred.

[Appellant's Attorneys, Messrs. van Zyl & Buissinne].

MCLEOD V. BENJAMIN.

Arrest—Writ—Domicile—*Peregrinus*—8th Rule of Court—Practice—*Einwald v. The German W. A. Co.* (5 Juta, 86) discussed.

Sir T. Upington for the applicant; Mr. Juta for the respondent.

This was an application made by the defendant to discharge a writ of arrest. From the statement of counsel for the applicant it appeared that the writ was obtained upon an affidavit sworn by Mr. A. H. McLeod, of Cape Town, in his capacity of agent of Mrs. E. H. B. McLeod, against Mr. David Henry Benjamin, of Pretoria, for the sum of £774. In support of the application counsel read the affidavit of the applicant, which stated that he was domiciled in the Transvaal Republic, where he held a large amount of valuable mining property. In November last his estate was placed under compulsory sequestration, on the petition of Roberts, Lubbock & Co., of London, by order of the Supreme Court of the Republic, but as it appeared to the Court that applicant possessed large and valuable securities, which only required time and opportunity for realisation, the Court ordered that only a decree of provisional sequestration should issue, returnable on May 12 next. He had since been engaged in the said Republic in the concentrating his affairs for the purpose of realisation, and finding it necessary and most desirable to proceed to Europe, where his principal creditors were, and which was the best market for gold stocks, especially in view of the present steady rise in values, the *curator bonis* in his estate applied to the Court for leave for applicant to proceed to Europe at the expense of the estate, and the Court was pleased to accede to the application and grant applicant £500 for his necessary travelling expenses. The plaintiff was alleged to be the agent of Mrs. McLeod, in whose favour applicant passed fourteen promissory notes, amounting to £774, all payable in the Transvaal, where the notes were now. Applicant had left the Republic only to proceed to Europe, and all his assets were under the control of the Master of the Court at Pretoria. If his departure by the mail steamer that afternoon were prevented it would be most disastrous to his creditors, and the object of the order of the Transvaal Court would be wholly frustrated.

Sir T. Upington, in support of the application, contended that the Court had no jurisdiction, and referred to "*In re Hillman*" (4 Juta, 384), and "*Einwald v. The German W.A. Co.*" (5 Juta, 86).

Mr. Justice Smith: In whom is his property vested?

Sir T. Upington: In the Master of the High Court at Pretoria.

Mr. Juta said that as to the statement in the affidavit that the debt was contracted in the Transvaal, that would be denied by the plaintiff. He also took the objection that the defendant could not apply for discharge of writ without giving twenty-four hours' notice.

The Chief Justice said that there were special circumstances—the steamer was sailing that afternoon.

Mr. Juta contended that the Court had jurisdiction, because, at the time the contract was entered into, both the contracting parties were *incolae*, and the debt was contracted in the Colony.

The Chief Justice said that the immediate cause of action in the case arose out of promissory notes given in the Transvaal and payable in the Transvaal. The defendant was domiciled in the Transvaal, and happened to be passing through this country, and the question was whether the plaintiff, who undoubtedly was domiciled in this country, was entitled to arrest the defendant under the 8th rule of Court. In his opinion he was not, because the rule assumed the jurisdiction as against the defendant, and jurisdiction had not been shown in the present case. In "*Einwald v. The German West African Company*," certain general rules were laid down. The Court then said that the grounds in respect of which an arrest such as the present one could be maintained were three, namely, by virtue of the defendants' domicile being here; by virtue of the contract either having been entered into here or having to be performed here, and by virtue of the subject matter of the action being in the Colony. If the defendant were domiciled here the process of attachment was wholly unnecessary, but in the absence of such domicile the invariable practice had been to attach the person or the property of defendant to found jurisdiction. In the present case the plaintiff would have done better had he applied to the Court for an attachment order, or to attach the defendant's person to found jurisdiction, and then, if the requisite conditions had been present, the Court might have granted the order. It was not necessary to say then what the decision would have been however, but the present process would be discharged with costs.

Mr. Juta asked if the Court would entertain the application suggested.

The Chief Justice: Which of the three requisites are present here?

Mr. Juta said the original debt was contracted in the Colony by two persons who were resident in it.

The Chief Justice said that would not apply, because the defendant was sued in respect of promissory notes signed and payable in the Transvaal.

Mr. Juta said the promissory notes were only given in pursuance of the original debt.

The Chief Justice said that the decision of the Court to discharge the writ did not preclude the plaintiff from moving in the direction of an order *ad fundandam jurisdictionem*, but at present the Court thought that no such order ought to be made, because the plaintiff was suing upon promissory notes, made and payable in the Transvaal, and the Court knew nothing of the previous debt, whether it was prescribed or novated.

The writ was therefore discharged with costs.

SUPREME COURT.

TUESDAY, MARCH 8.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice SMITH, and Mr. Justice BUCHANAN.]

REGINA V. JACOBS.

On the motion of Mr. Giddy the venue in this case was changed to Victoria West.

ADMISSION.

On the motion of Mr. Searle, Mr. Edward Isaac Sydney was admitted as an attorney.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE HUGH
MCLACHLAN.

Mr. McLachlan moved for an order authorising the Registrar of Deeds to amend the description of certain piece of ground situated in Lelie-street, Cape Town, erroneously set out of Block 10, and with a mistake of thirty square feet in extent, as per transfer deed of the 25th April, 1876, and several previous transfers.

The order was granted.

IN THE ESTATE OF THE LATE LOUISA H. STURK.

Mr. Searle moved for an order directing the Registrar of Deeds to cancel certain deed of hypothecation for £700 passed by the said Louisa H. Sturk to secure an inheritance due to her son, since deceased, and now devolving upon his children, all of whom are majors.

The order was granted.

ODENDAAL V. ODENDAAL.

Mr. Watermeyer applied for the removal of the suit instituted by the plaintiff against her husband, for divorce by reason of his adultery, for trial at the Riversdale Circuit Court on the 16th inst.

The order was granted, and Mr. Tredgold appointed counsel.

PETITION OF G. D. GRIESSEL.

Mr. Molteno moved for an order authorising the Registrar of Deeds to amend certain deed of transfer of a piece of perpetual quitrent land marked No. 166, situate in the district of Swellendam, passed on April 17, 1871, in favour of the petitioner and another, by substituting petitioner's correct name of Gert Diederich Griessel for that of Gert David Griessel.

The order was granted.

IN THE ESTATE OF THE LATE PETRUS J. HUGO.

On the motion of Mr. Graham an order was granted authorising the executors of the Estate to pay to the mother of the two minor daughters of Cornelis C. Hugo, now deceased, the interest on their inheritance out of the estate of their grand parents for the purpose of being applied towards their maintenance during minority.

IN THE ESTATE OF THE LATE THOS. H. GIDDY.

Mr. Juta moved for an order authorising the sale of certain unproductive lands in the estate, and also certain shares in joint-stock companies and for leave to raise a loan on mortgage of the house property for the purpose of extinguishing the debts of the estate.

The order was granted, subject to the certificate of the Master that the minors will not be prejudiced.

LIND AND KING V. CALITZ AND OTHERS.

Sale — Cancellation — Will — Prohibition against alienation—*Fidei-commissum*—Insolvency—Interdict—Rule *nisi* discharged. On an *ex parte* application the applicant should state fully every fact within his knowledge which might influence the Court in withholding the order applied for.

Mr. Searle appeared for the applicants, and Mr. Schreiner, Q.C., for the respondents.

This was an application to make absolute a rule *nisi* granted on the 19th January, 1892, and which operated as an interdict restraining the respondents

from interfering with the crops and removing or appropriating the same to their use from certain property alleged to be owned by applicants, and situated in the division of Oudtshoorn.

It appeared from the affidavit of King that on the 22nd May, 1891, he purchased at public auction from the insolvent estate of the late M. C. Calitz shares in the farm Warmwater and other properties.

That the sale was provisional pending the confirmation of creditors.

That on the 21st October, 1891, at a duly-constituted meeting of creditors in the aforesaid insolvent estate, the sale to King was confirmed, and title in his favour of the share in the farm Warmwater, comprising half-share of lots G, N, H, H, and A was duly completed and registered on the 11th December, 1891.

That owing to certain complications the titles of the remaining properties had not yet been passed to deponent.

That the respondents and King are, and were at the date of the sale to the latter, in occupation of parts of the farm Warmwater, which is an agricultural farm, the other properties being merely grazing farms.

That after the confirmation of the said sale the deponent caused notices to be served on respondents and defendants, requesting them to quit and yield possession of the land.

That notwithstanding the premises the respondents and defendants have neglected and refuse to quit the said land, ignoring deponent's rights as owner, and have ever since the sale to deponent treated and dealt with the fruits and crops of the said property as their own.

That deponent has sold his half-share in lots W and A to deponent's co-applicant and plaintiff, Christian Michiel Lind.

That deponent and his co-applicant and plaintiff are now instituting actions to eject the said respondents and defendants and all those holding under them from the said shares of the farm Warmwater, and claiming the crops and fruits as their property; meanwhile, pending such action, deponent and his co-plaintiff and applicant are anxious to have and secure an interdict restraining the said defendants and respondents and all those holding under them from interfering with the crops, and from using or appropriating the same to their use.

The defence of the respondents was embodied in the following affidavit: Matthys Christian Calitz, one of the above-named respondents, makes oath and says:

He is a son of the late Matthys Christian Calitz and of the co-respondent, Susana Johanna Calitz, who is a daughter of the late Hendrik Everhardus Grindling, of the farm Warmwater, in the district of Oudtshoorn.

In 1878 deponent's father, the said Matthys Christian Calitz, appears to have purchased from his father-in-law, the said H. E. Grindling, certain one-ninth part or share of the farm Warmwater for the sum of £800. The said Calitz paid transfer duty, but being unable to carry out the conditions of sale the said sale was cancelled by mutual consent.

That thereafter the said Grindling and his wife Maria, by will dated 1st September, 1881, bequeathed the said share of the farm to deponent's mother for the sum of £800, subject to certain restrictions against the alienation thereof.

Thereafter, to wit in the said year 1881, the said Grindling died, his wife surviving him.

Thereafter, in or about the year 1886, the said Maria Grindling died, leaving a will whereby the several legatees under the joint will of her husband and herself were relieved of the payment of any money in respect of the land bequeathed to them.

Deponent's father, the said Matthys Christian Calitz, died in 1884, leaving a widow and eleven children, of whom six are still minors.

Thereafter, to wit on the 28rd October, 1885, the estate of the said Matthys Christian Calitz was surrendered as insolvent, and since the date of his father's death deponent together with his mother and major brothers have remained in possession of the said share in the farm, and paid the quitrent and all other rates and taxes thereon.

The trustees in the said insolvent estate have tried to dispose of the widow's life-right in the farm, but could obtain no satisfactory bid for it. To the best of deponent's knowledge and belief, however, the trustees did not set up any claim to the ground until the month of May last past, when deponent received a handbill or notice of sale. Upon receiving such handbill deponent, on behalf of himself and other children, spoke to Andries Grindling, executor in the estate of the late H. E. Grindling. The said Andries Grindling thereupon assured deponent that in view of the terms of the will the land could not be sold, and strongly advised deponent not to bid in the event of its being offered for sale.

Thereafter a sale was held as appointed, the applicant Lind being the auctioneer employed. Before the ground was put up for sale deponent, in the presence and hearing of the co-applicant King, whom deponent called in as a witness, warned the said Lind not to proceed with the sale as being contrary to the terms of the will; but in spite of deponent's objections the said Lind proceeded with the sale, and the ground was knocked down to the said King for the sum of £84.

After the sale deponent again spoke to the executor, Andries Grindling, and informed him of the result of the sale. Deponent also informed him that Lind had said that the said Andries Grindling had authorised the transfer from the

estate of the late H. E. Grindling to the trustees of the insolvent estate of the late Matthys C. Calitz.

The said Andries Grindling denied that he had done so, and said he had signed a power to pass transfer in the name of deponent's father, and had instructed the said Lind that so soon as such transfer was completed Lind should give notice to deponent and his brothers to release the said deed with the view of thereafter taking transfer themselves.

In consequence of what deponent told Andries Grindling certain proceedings were instituted in the honourable the Supreme Court, and on the 17th October last an order was granted by His Honour the Chief Justice restraining the Registrar of Deeds from passing transfer in favour of the said trustees.

Thereafter, to wit on the 1st December, 1891, the interdict was withdrawn by the attorneys employed in the case, and transfer was accordingly completed in favour of the said trustees.

Deponent has referred to the deed of transfer filed at the Deeds Office, and finds that the said executor, acting presumably in ignorance, has ignored the fact of the cancellation of sale between the late H. E. Grindling and the late M. C. Calitz, and the making of the subsequent bequest in favour of deponent's mother, and has passed transfer on the strength of the sale of 1878. The purchase amount of £800 is stated in the deed of transfer to have been satisfactorily paid, but from inquiries made deponent believes that no portion of this amount was ever paid, either by the insolvent or his trustees.

Deponent is not aware of the nature of the agreement between the co-applicants, but it is a significant fact that soon after the sale by auction the said King went through the form of a sale in favour of the auctioneer Lind of half-share of the ground bought by him as aforesaid. King received transfer on the 11th of December and gave transfer to Lind on the 22nd December.

Deponent has been informed, and verily believes that the said Lind has since offered to sell one-quarter of the half-share so acquired by him for the sum of £200.

Deponent considers the value of the land sold to the said King to be £2,000, and as a matter of fact deponent and his brothers were offered that sum.

Deponent begs leave to refer this honourable Court to the terms of the will of the late Hendrik Everhardus Grindling and his wife Maria, dated 1st September, 1881, and to the bequest therein in favour of deponent's mother, subject to certain restrictions against the alienation of the property bequeathed. Deponent has annexed hereto a copy of a letter from one of the trustees, McIntyre, dated 28rd August, 1887, addressed to the Master of the Supreme Court, in which he practically

admits that in terms of the said will the trustees are restrained from alienating.

Deponent considers that the interest of his minor brothers and sisters have been seriously prejudiced by the action of the trustees in selling the property bequeathed, and he craves that a *curator ad litem* may be appointed by the Court to protect the interest of the said minors, their mother being in very indigent circumstances and quite unable to do so.

Lastly, deponent begs leave to refer this honourable Court to a document hereto annexed, purporting to be a copy of the order granted by the Court on the 20th January last, but which deponent is now informed is not a true copy thereof. The original order was not exhibited to deponent at the time of service of the said copy, nor were any copy affidavits handed to him.

The clause of the will referred to in the affidavit of Calitz was as follows: "Lastly, all the heirs shall have no right under the will to sell until the second generation."

(The answering affidavit of Mr. McIntyre, one of the trustees, was to the following effect).

I, Robert Alfred McIntyre, of Cape Town, make oath and say: That I have perused the affidavit of Matthys Christian Calitz sworn to on the 10th day of February, 1892.

That I was appointed one of the trustees of the insolvent estate of Matthys Christian Calitz.

That the property which was sold to the applicant, J. T. King, on the 22nd May, 1891, provisionally and subsequently confirmed, was prior to the said sale, put up by public auction on two previous occasions.

That the amount paid by the said King was the highest offer received by the trustees.

That the executor of the estate of the late Hendrik E. Grundling on or about the 12th October, 1891, passed transfer of the land now in question to the trustees of the insolvent estate of Matthys Christian Calitz under the sale mentioned in paragraph 2 of the affidavit of M. C. Calitz above referred to.

That some of the heirs of the late M. C. Calitz applied to his Honour the Chief Justice of this Honourable Court for and obtained an interdict on the 17th October, 1891, restraining the Registrar of Deeds from parting with or delivering the Deed of Transfer to the said insolvent estate, but upon the advice of their legal advisers they withdrew the said interdict.

From the Transfer Duty receipt annexed to the Deed of Transfer to Christian Michiel Lind it appears that certain of the property was sold by J. T. King to the said Lind on the 21st October, 1891.

Deponent believes notice was given to the applicants or some of them before the sale to J. T. King took place.

I lastly say that I believe that the said applicants would be willing to withdraw the present application for an interdict and allow respondents to remove their crops and even pay their own costs, to save litigation, the costs of which, I verily believe, could not be paid by the respondents, if the said respondents gave up peaceable possession of the said land.

Mr. Searle was heard in support of the rule, and on the construction of the will and the prohibition on alienation referred to Voet (86, 1, 28) and "*In re Naudé and Wife*" (1, C.T.L.R., 282).

Mr. Schreiner: The point to be decided is the construction of the clause of the will prohibiting alienation until the second generation. A simple provision that heirs shall not alienate creates a *fidei commissum* which extends to the fourth generation. The language used in the present case is stronger. It may not be very clear, but the broad intention is easily seen. Counsel referred to Sande (8, 6, 27 and 28).

The Chief Justice: You read the clause as constituting a *fidei commissum* in favour of the second generation?

Mr. Schreiner: Yes. Again, the transfer following the alleged sale was not obtained for years and years after the sale. If the will had been referred to the Registrar of Deeds he would never have passed transfer, and it almost appeared as if some method had been sought by which transfer had been slipped through the Deeds Office.

The Chief Justice asked Mr. Searle if he did not consider, when the rule was applied for, that the applicants should have put all the facts before the Court. If he had known all the circumstances, he would not have granted the rule nisi. Persons who made *ex-parte* applications of this nature ought to make the Court acquainted with all such facts as might induce the Court not to grant, but to withhold the order.

Mr. Searle said that all the facts were now before the Court.

The Chief Justice, in giving judgment, said that the Court had repeatedly decided that where an *ex-parte* application was made, the applicant should state to the Court fully every fact which he knew might induce the Court not to grant the order. In cases of provisional sequestration the Court had more than once acted upon that principle. In the present case he thought it was the duty of the applicants to have stated all the facts to the Judge in Chambers. There had been a concealment of the fact that the will was in dispute, and there was the concealment of a great many other material facts which, had they been known to him in Chambers, he would certainly not have granted the rule, but would have directed the parties to file pleadings, and have the matter decided by action. On that simple ground the rule ought to

be discharged with costs. But he would be inclined to go a little further. The question of the construction of the will would really not arise until the question had been settled as to whether there had been a cancellation of the sale or not. If there was no cancellation of the sale then of course it would remain in force, and the question of the will would not arise, inasmuch as the sale took place after the testator died, but if there had been a cancellation then the question of the construction of the will would come before the Court. He would have been prepared then to give his opinion as to the construction of the will, except that Mr. Searle said that he had not had an opportunity of fully arguing the point and looking into the authorities, but he was inclined to think that there was much force in the view that the *fidei commissaries* were really indicated, and that the testators used the words "until the second generation" as intending that the *fidei commissaries* should take the property after the death of the fiduciaries, but it would be unnecessary to express any definite opinion then. As to the rule already granted, it ought to be discharged with costs.

PETITION OF THE LORD BISHOP OF CAPE TOWN.

Mr. Searle moved for leave to sell certain farm properties in the district of Clanwilliam bequeathed in trust for the purposes of the Church by the late Richard Grisold.

The order was granted.

GRAHAM V. KER.

Slander—Action—Damages—Cape Mounted Rifleman—Resident Magistrate—Partiality—Rejection of material evidence—Ordinance No 73, Sec. 3—190th Rule of Court—Review.

Per De Villiers, C.J.—The Court had never construed the words "for the public interest" very strictly, and had said that where stale stories had been raked up that was not for the public interest.

Mr. Schreiner, Q.C., appeared for the appellant (Mrs. Graham); Mr. Juta for the respondent Ker, and Mr. Giddy for the Resident Magistrate of Seymour.

This was a summons for the review of certain proceedings in the Resident Magistrate's Court of Seymour, Stokenstrom, in which the appellant was the defendant and Mr. Ker the plaintiff, the case being tried before Mr. Friesell, Resident

Magistrate of Seymour. The summons for review was on the following grounds:

1st. Rejection of legal and competent evidence tendered on behalf and in defence of the appellant.

2nd. Gross irregularity in the proceedings and incompetency of the Magistrate, by reason of his partiality and favouritism and his espousal of the cause of the respondent (Ker).

3rd. Proceedings otherwise wholly irregular and contrary to law.

In the action tried in the Magistrate's Court the respondent Ker, a private in the C.M.R., sued the appellant (Mrs. Graham) for £20 damages alleged to have been sustained by reason of certain slanderous words spoken and published by her of and concerning Ker. The Magistrate gave judgment for the plaintiff for the full amount claimed with costs. The alleged slander was contained in the following words spoken by Mrs. Graham to her sister-in-law:

"He (meaning Ker) was seen down by the river with a Kafir girl."

The defendant denied liability and pleaded the general issue, and she specially pleaded that at the time of the speaking of the said words the plaintiff (Ker) was a member of the C.M.R., and that the words were spoken *bona fide*, on reasonable grounds, and without malice, and that they were substantially true, and were spoken in the public interest.

According to the affidavit of the appellant's agent (Mr. Nicholas Henry Smit, of Seymour), when these pleas had been perused by the Magistrate, the latter said that if they were put in he would not allow him (the agent) to put a single witness into the box to prove the plea of truth. The affidavit continues. . . . As this direction of the Magistrate was so peremptory, I felt that rather than imperil the case of my client, I would substitute for them the plea which ultimately appears on the record. (The latter plea was as follows: Defendant pleads that the words alleged in the summons to have been spoken by her are substantially correct, that the communication was privileged, that at the time of the speaking of the said words the plaintiff was a member of the C.M.R., and that the words were spoken *bona fide*, on reasonable grounds, and without malice, that they are substantially true and were spoken in the public interest, and therefore denies liability.)

4th. I say further that in addition to what the Magistrate said, his position and demeanour on the bench convinced me that unless I withdrew the first pleas tendered he would not allow me to go into the real defence of the case and I therefore withdrew those pleas, but not for any other reason.

5th. I say further that during the hearing of the case the Magistrate showed by his manner and his

leaning that he was espousing the cause of the plaintiff Ker, and that whatever evidence might be produced at the trial his judgment would be for that gentleman.

In further proof of this I say that before I had the slightest chance of calling any evidence for the defence, the Magistrate proceeded to give judgment in favour of the plaintiff Ker, and that he was only stopped by my interruption and my desiring to call some of my witnesses.

After argument the Magistrate consented to hear witnesses, remarking that it would be necessary to hear some evidence to enable him to assess the damages, and the plaintiff's witnesses were then heard. I then tendered several witnesses to prove the truth of the plea, but the Magistrate refused to hear them, and when pressed ultimately said that their evidence was inadmissible.

(Then follow the names of the witnesses whose evidence, it was alleged, the Magistrate refused to hear.)

7th. I say further that, by the Magistrate refusing to hear these witnesses, a very great injustice has been caused to my client, Mrs Graham, and that there has been a very serious miscarriage of justice.

The allegations contained in this affidavit were denied by the Magistrate and other persons who were present at the hearing of the case, but were substantiated by others, including two clergymen, who were also present.

Mr. Schreiner, in support of the summons, contended that the Magistrate was in error in refusing to accept a plea of the general issue, coupled with a plea of truth, *bona fides*, and that the words were spoken in the public interest.

A defendant is not put to his election in such a case to admit or deny (Odgers on Slander.)

When the recorded plea was tendered the Magistrate was bound to hear evidence. This he only did in the plaintiff's interest with a view to assessing damages. He had thus manifestly prejudged the case.

The refusal to allow the plaintiff to be cross-examined as to the truth of the charge was grossly irregular. The evidence was clearly admissible whatever might be the decision as to privilege, or as to the public interest.

So, too, the defendant was entitled to give evidence in support of the plea of justification, and her witnesses should have been heard.

There is very strong ground for the averment that the Magistrate took a partial and biased view of the case. The large number of unprejudiced witnesses, including two ministers of religion, cannot have fancied all they depose to. If what they aver is correct, the Magistrate exhibited lamentable bias and prejudice.

The alleged slander was uttered on a privileged

occasion. It was quite proper for the defendant to warn her sister-in-law of the alleged immoral conduct of the plaintiff, with whom defendant's sister-in-law was acquainted.

Nothing shows the bias of the Magistrate more than his readiness to pronounce judgment without hearing any evidence.

The following authorities were referred to in argument: "*Michaelis v. Braun*" (4 Juta, 206), "*Botha v. Brink*" (8 R., 30), "*Sparks v. Hart*" (3 Menzies, 3), "*Keyter v. Le Roux*" (3 Menzies, 23), "*Regina v. Nathanson*" (5 Juta, 109), Ordinance No. 73, section 3, and the 190th Rule of Court.

Mr. Juta and Mr. Giddy were also heard.

The Chief Justice, in giving judgment, said that as a general principle it was for the public benefit that the truth should be known as to the characters of persons, and the public interest was greater still when the person in regard to whom the defamatory statements were made occupied a public position. The plaintiff in the present case was a private in the C.M.R., he received pay from the public, and it was for the public benefit that it should be known how this rifleman, paid by the public generally, behaved himself. As a policeman in a native district, he (the Chief Justice) thought it was very inadvisable for the plaintiff to mix up with native women, and if any policeman had misconducted himself in the way in which it was alleged that the plaintiff had done, he thought it was for the public benefit that his conduct should be made known. The Court had never construed the words "for the public interest" very strictly, and had said, where stale stories had been raked up, that that was not for the public interest. In one case, for instance, it was said against a man that he had been committed, twenty years before, on a charge of rape, and the Court said that even if he had it was not for the public interest that it should be made known. In the present case he was of opinion that the Magistrate erred in not allowing evidence of justification. The plea of justification apparently, was admitted, and evidence in support of it should also have been allowed, and inasmuch as the 190th Rule, taken in connection with the Ordinance, authorised the Court to review cases under circumstances like the present, the case ought to be remitted to the Magistrate, with directions to take evidence in support of the plea of justification, and decide the case on its merits after hearing that evidence. Costs would be costs in the cause.

Mr. Justice Smith desired to express his opinion that, inasmuch as it was desirable that the public should have thorough confidence in the impartial administration of justice, it would be better if the case could be tried before some other magistrate than the officer who first tried it.

Mr. Justice Buchanan said that an improper course had been taken in bringing the case for review instead of appeal, and that the Magistrate ought not to have been made a party to the case.

The Chief Justice said that, as to the general principle, he quite agreed with the view expressed by his brother Buchanan; but there might be cases, as, for instance, where malice and corruption were charged against the magistrate, where that officer could not avoid being made a party to the suit.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinne; Respondent's Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT.

SATURDAY, MARCH 12.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

WHITE, MULLER AND CO. V. SCHREIBER.

Mr. Schreiner moved for provisional sentence on six promissory notes, dated February, 1891, the last of which fell due in October, 1891, for the amount of £187 7s. 8d., and also that certain property, mortgaged to plaintiffs and of the value of £400, be declared executable.

Mr. Juta appeared for the respondent, and read his affidavit to the effect that £56 1s. 8d. was all the money he owed, the remainder having been paid to plaintiff's agents at Johannesburg.

The Court decided to hear argument in the case on Tuesday.

Postea (March 15.)

After argument.

The Chief Justice gave judgment. He said that in this case a certain balance had been arrived at, subject to the right of the defendant to object to certain items, which the plaintiffs were now willing to forego. It now lay on the defendant to show that further deductions ought to be allowed, and he had not satisfied the Court on the present application that such further deductions should be permitted. The Court would give provisional sentence for £101 7s. 4d. with costs and interest from the due dates of the bills, but it would still be open to the defendant to enter appearance and go into the merits of the case.

LEWIS V. SCHMIDT.

Mr. Watermeyer moved for a writ of civil imprisonment on the unsatisfied balance of a judgment for £9 17s. 2d.

The order was granted.

STANDARD BANK V. J. F. M. RETIEF.

Mr. Watermeyer moved for provisional sentence on a promissory note for £800, less £82 12s. 6d. paid on account.

The order was granted.

RICHARDSON V. DOLBEY.

Mr. Watermeyer moved for a writ of civil imprisonment on an unsatisfied judgment for costs, amounting to £89 14s. 2d., due by the defendant in connection with an action for divorce in which he was co-defendant.

The defendant appeared in person, and said that he was unable to pay the money, his salary being only 80s. per week.

The Court granted the writ of civil imprisonment, the decree to be suspended pending payment of £1 per month, first payment on April 1.

VOIGT V. IMORKEL.

Mr. Sheil moved for judgment, under rule 829, for £10, less £1 17s, being the amount of arrears due on a share in the Waterloo Gold-mining Company (Limited).

The order was granted.

In re WEGE.—*In re* KINLOCK.

Mr. P. A. Wege was admitted as attorney and notary, on the motion of Mr. Juta; and Mr. H. G. Kinloch as attorney, on the motion of Mr. Schreiner.

REHABILITATIONS.

The Court granted the following rehabilitations on motion from the Bar: Frederick Cornelius Jeremias Nortje, Andries Jacobus Stephanus Lessing, Frans Jacobus Lubbe Burger, Jan Hendrik Potas (release), Hendrick Nicholas Schiekerling, and Hendrick Christian van Breda.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE STEPHANUS C. DU PLESSIS

Mr. Moltano moved to make absolute the rule nisi giving validity to the transfer of the 6th September, 1886, relating to certain farm called

Peltzer's Baken, in the district of Philip's Town, and for authority to the Registrar of Deeds to correct a certain deed of transfer of the said property.

The order was granted.

IN THE MATTER OF JOSEPH MCCABE, A
LUNATIC.

Mr. Sheil moved for leave to the curators to sell by public auction or otherwise certain landed property situated in Queen's Town belonging to the estate, and to apply the proceeds in satisfaction of mortgage and other debts due.

The order was granted. The Court intimated, however, that applications of a similar nature would not be granted.

VAN NIEKERK V. VAN NIEKERK.

Mr. Molteno applied for the removal of the suit instituted by the plaintiff against her husband for restitution of conjugal rights, failing which for divorce by reason of his malicious desertion, for trial at the Circuit Court to be held at Prince Albert on the 31st March.

The order was granted.

IN THE ESTATE OF THE LATE ADRIAAN A.
JURGENS.

Mr. McLachlan moved to make absolute the rule nisi issued under the Titles Registration and Derelict Lands Act, 1881, for transfer to the said estate of certain piece of land at the foot of the Lion's Hill in Cape Town, purchased in 1866, but omitted to be transferred.

The order was granted.

SUPREME COURT.

TUESDAY, MARCH 15.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), and Mr. Justice SMITH.]

PETITION OF ANDREW D. UDEMANS.

Mr. Maskew moved for a rule nisi requiring petitioner's wife to show cause why he should not be admitted to sue her *in forma pauperis* in an action for divorce by reason of her adultery.

The order was granted, and the rule made returnable on April 12.

IN THE MATTER OF W. R. MYBURG, AN
ALLEGED LUNATIC.

Mr. Molteno moved for leave to the sister of the alleged lunatic to issue a summons against him requiring him to show cause why he should not be declared to be of unsound mind and incapable of managing his affairs.

The order was granted, and the rule made returnable on April 12. Mr. Webber was appointed *curator ad litem*.

In re KNYSNA CONSOLIDATED GOLD-MINING CO.

Mr. Juta moved for an order in terms of the report of the official liquidator. The report stated that tenders were called for the machinery, the only asset, for which £600 had been offered.

The Court made an order in terms of the report.

NESBITT V. NESBITT.

Mr. Webber moved for leave to sue by edictal citation, returnable first day of next term, in the suit instituted by the plaintiff against her husband for restitution of conjugal rights, failing which for divorce.

The order was granted.

TAYLOR AND SYMONDS V. SCHUNKE.

Mr. Molteno moved for judgment in terms of a consent paper signed by the parties in respect of an award of the arbitrators, and further proceedings to compel the execution thereof.

Judgment was given as prayed.

WOODCOCK V. WOODCOCK.

Mr. Molteno moved to make absolute the rule nisi requiring the defendant to restore to his wife her conjugal rights, failing which to show cause why the marriage subsisting between them should not be dissolved.

The rule was made absolute, and divorce granted.

In re THE PAARL BANK.

Mr. Schreiner moved for the confirmation of the following compromises:

Jan S. de Villiers, A.M.sen., offers for his liability on five shares, and further liability, £1,250, a cash payment of £2,085 10s., and to surrender the dividend awarded on his claim against the insolvent estate of C. Darkson of £289 11s. 10d.

J. H. Pepler offers for his liability on mortgage bonds and promissory notes, amounting to £1,767 0s. 6d., a cash payment of £500, and the further sum of £100, of which £50 is payable 18th May, 1892, and £50 in April, 1893.

H. L. Pepler offers for his liability on mortgage bond and promissory notes direct and indirect, amounting to £8,816 18s. 3d., a cash payment of £1,460, and a further sum of £60 payable July, 1892.

G. W. Minnaar offers for his liability, amounting to £5,330, a cash payment of £250.

Stephanus Isaac du Toit offers for his liability on a mortgage bond for £460 a cash payment of £850 and a deposit of £17 10s. in the bank.

J. H. L. Bohlman offers for his liability on forty-seven Paarl Bank shares, £11,750, a cash payment of £1,400 with interest from February, 1891.

The Court confirmed the report.

PETITION OF EDWARD GOMES AND OTHERS.

Mr. Molteno moved for authority to petitioners as beneficiaries under certain deed of donation executed in 1869, by which they became possessed of a piece of ground, marked No. 58, at Plumstead, to transfer the said land, the trustees appointed by the deed being both dead.

The order was granted.

ADMISSION.—IN RE COYTE.

On the motion of Mr. Shell, Mr. H. D. Coyte was admitted as attorney and notary public. The oaths to be taken before the Registrar, Eastern Districts Court.

SUPREME COURT.

(IN CHAMBERS).

TUESDAY, MARCH 22.

[Before Mr. Justice SMITH.]

In re BROWN.

On the application of Mr. Maskew, Mr. Malcolm Stewart Brown was admitted as an attorney; the oaths to be taken before the Registrar of the High Court.

In re THE PETITION OF CHRISTIAN COENRAAD MALAN.

Mr. Maskew, on behalf of petitioner, moved for leave to sell a certain erf marked No. 4, situated in the village of Sutherland, the property of petitioner's minor sons, both he and they being absent from the Colony, and having no intention of returning.

The matter was ordered to stand over for information as to the proposed re-investment of the proceeds of the sale.

In re THE PETITION OF PETRUS JOHANNES MINNAAR.

On the motion of Mr. Maskew, authority was given the Registrar of Deeds to amend a certain deed of transfer, dated 28th April, 1869, of a half-share of a lot of ground marked No. 28, in the village of Murraysburg, by substituting petitioner's correct name for that of Pieter Jacobus Minnaar.

SUPREME COURT.

(IN CHAMBERS).

TUESDAY, MARCH 29.

[Before Sir J. H. DE VILLIERS, K.O.M.G. (Chief Justice), and Mr. Justice SMITH.]

In re HUNT.

Mr. Graham moved for the admission of Mr. Clifford Athol Hunt as an attorney and notary.

Admission ordered; oaths to be taken before the Resident Magistrate, King William's Town.

In re KING.

Mr. Shell moved for the admission of Mr. Lewis Henry King as a conveyancer.

Admission ordered; oaths to be taken before the Resident Magistrate, King William's Town.

In re SMITH.

Mr. Shell moved for the admission of Mr. Henry Samuel Squire Smith as a conveyancer.

Admission ordered; oaths to be taken before the Resident Magistrate, King William's Town.

IN RE THE PETITION OF J. A. ANDRE.

Will—Inheritances—Law of Testator's domicile—Prusso-Rhenish Provinces—Order of Court of Chancery — Minors — Legal guardian—Counter-guardian.

Mr. Graham moved for authority to the Master to pay out to petitioner the balance in the Guardians' Fund standing to the credit of Fanny Phebe Andre (born Valentin).

The facts appear sufficiently from the affidavit of Mr. Attorney Syfret, which was read in court, and which was to the following effect :

1. The said Johann Adam Andre was married on the 29th day of August, 1882, to Fanny Phoebe Andre, widow of the late Jean Oscar Emil Leussen and daughter of Johan Philipp Valentin. The said Fanny Phoebe Andre died on the 9th June, 1888, leaving two children born in her marriage with the said Johann Adam Andre; there was, petitioner is informed, no issue of the former marriage. Petitioner annexes hereto certificates proving the death of the said Leussen and the marriage of his widow with the said Andre, and the death noti . . . the said Fanny Phoebe Andre, said certificates being marked A and B respectively.

2. The said Johan Philipp Valentin, formerly of the Cape of Good Hope (father of the said Fanny Phoebe Andre) died on the ———, and his executor, Francois Collison, paid into the Guardians' Fund at the Cape of Good Hope the sum of £15,687 10s. 5d., divisible among the following children of the said Johan Philipp Valentin, to wit: (1) Helena Catharine; (2) Anna Maria Sophia; (3) Maria Magdalena Adelheide; (4) Josef Georg; (5) Elizabeth Ernestina; (6) Fanny Phoebe; (7) Johan Philipp. The portions of Josef Georg and Johan Philipp were paid out by the Master of the Supreme Court as soon as they attained majority, and claimed the money. A copy of the will of Johan Philipp Valentin is herunto annexed, marked C.

3. An order was made by the Court of Chancery in England on the 10th July, 1885, copy whereof is herunto annexed, marked D, in a cause "Valentin v. Collison," wherein it was declared that the plaintiff and defendant therein named as two of the children of Johan Philipp Valentin aforesaid became, upon the death of Anna Maria Valentin, his widow, absolutely entitled to two shares of the testator's residuary estate both in England and at the Cape of Good Hope, the whole into seven shares being considered as divided; and that it appearing by the chief clerk's certificate in the said cause that according to the law of Frankfort-on-the-Maine, the place of domicile of the said testator, and notwithstanding the terms of the testator's will, each of the testator's five daughters therein named, including Fanny Phoebe Valentin and the deceased defendant, Maria Magdalena Adelheide Newhaus became, upon the death of the testator's said widow, absolutely, and without limitation of any kind, entitled to three-fourths of the one-seventh share bequeathed to each of such daughters for their lives respectively by such will, and became entitled to the remaining one-fourth of such share pursuant to the limitations in such behalf contained in the said last will with reference to the shares and interest of the testator's said daughters

therein contained. And it appearing by the said chief clerk's certificate that the deceased defendant Maria Magdalena Adelheide Newhaus died on the 8rd July, 1862, leaving by her husband the defendant, Otto Newhaus, of Elberfeld, in Prussia-Rhenish Provinces of the Kingdom of Prussia, three children, Louise Newhaus, Carl Philipp Alexander Newhaus, and Anna Maria Newhaus, and no more, and that the last-named child died on the 29th December, 1868. And that by the law of Frankfort-on-the-Maine, and of the said Prussia-Rhenish Provinces, the said three infant children of the said Maria Magdalena Adelheide Newhaus on her death inherited their mother's estate in equal shares, and that the share of the said infant child Anna Maria Newhaus on her death devolved on her father and her surviving brother and sister in the following parts and proportions, namely: Two-eighths to the father absolutely, and three-eighths parts to each of the said surviving brother and sister, and as to the shares of the said surviving infant children in their said mother's estate, the said defendant the said Otto Newhaus, the father of the said two children, alone had the right, as their legal guardian, to administer the property of his children under the control of a counter-guardian appointed according to the law of the Prussia-Rhenish Provinces, and that the principal and interest of such shares of the two surviving infant children in their mother's estate was payable to the said Otto Newhaus as such legal chief guardian, and that he was entitled to the usufruct thereof until such children should have attained the age of eighteen years. It was ordered that Francois Collison (since deceased) the trustee of the testator's will, at the expense of the party or parties requiring him to do so, should take and concur in all necessary proceedings for enabling the said Otto Newhaus to receive from the said Supreme Court at the Cape of Good Hope the one-seventh share of the said late Maria Magdalena Adelheide Newhaus of the testator's state then lying in the said Court.

4. The said declarations and directions in such order contained were, petitioner is informed, duly complied with, and application was made to this Honourable Court to order the Master to pay out to the said Otto Newhaus the portion of the moneys that was standing to the credit of the said Maria Magdalena Adelheide Newhaus, and on the 7th February, 1867, it was ordered that one-fourth of one-seventh be paid out at once to the applicant (Otto Newhaus) and that the remainder do remain until Mr. Francis Collison shall send out an authority for the payment of the amount, and supply some proof that the counter-guardian approves of the payment out to Otto Newhaus.

5. Thereafter the said Francis Collison and Adolf Fager, the counter-guardian, formally

signified their assent, and the Court did on the 12th July, 1867, order that the balance, with interest, be paid to Otto Newhaus.

6. The statements contained in the said recited order of the Court of Chancery with regard to the effect of the Law of Frankfort and the persons entitled to the estate of the testator's daughter Maria Magdalena Adelheide Newhaus appear to be applicable, *mutatis mutandis*, to the case of the estate of the said Fanny Phoebe Andre, and accordingly the said Joseph Alphans Andre and Maria Margaretha Helena Andre inherited on their mother's death her estate in equal shares, and their said father, Johann Adam Andre, alone has the right, as their legal chief guardian, to administer the property of his children under the control of a counter-guardian, appointed according to the law of the Prusso-Rhenish Provinces, and that the principal and interest of such shares of the said two children in their said mother's estate is payable to the said Johann Adam Andre as such legal chief guardian, and he is entitled to the usufruct thereof until such children shall have attained the age of eighteen years.

7. Thereafter it appears that the other female heirs of the said Johan Philipp Valentin (the testator), by order of this Honourable Court, respectively drew out three-fourths of their shares of their inheritance. The order of Court relating to the share of the said Fanny Phoebe Andre (then Leussen) was made on the 27th September, 1870, and is in the following terms: "Upon motion this day made to the Court by Mr. Attorney-General, it was prayed for an order upon the said Master to pay over to the applicant, duly authorised by Johanna Oscar Emil Leussen, of Dasselderf, in the Kingdom of Prussia, and Fanny Phoebe Leussen (born Valentin), his wife, a daughter of the above-named Johan Philipp Valentin, the three-fourth part or share of the estate of the said Jehan Philipp Valentin (deceased), due to the said Fanny Phoebe Leussen free from the limitation contained in the will of the said Johan Philipp Valentin: Whereupon, and upon reading the affidavit of John Robertson Reid, of Cape Town, and the documents thereto attached, it is ordered as prayed."

8. The three-fourths share was duly drawn from the Master, and the estate of the said Fanny Phoebe Andre petitioner believes now consists of the capital sum of £614 Os. 11d., now standing in the office of the Master of the Supreme Court at the Cape of Good Hope, together with interest accrued thereon from the 31st day of December, 1887. But the said Master declines to part with such capital and interest unless there is produced to him an order of this Honourable Court as his authority for so doing.

9. On the 9th December, 1891, Peter Zenz was, petitioner is informed, duly appointed, according to the law of the Prusso-Rhenish Provinces, the counter-guardian of the said two infant children of the said Fanny Phoebe Andre, and is still such counter-guardian.

10. By a document dated 9th January, 1892, hereunto annexed, the said Peter Zenz, in his said capacity, did declare that he approved of the payment of the shares of the said two infant children of the said Johann Adam Andre and Fanny Phoebe, his deceased wife, in their mother's estate to the said Johann Adam Andre, as the lawful chief guardian of the said two infant children, and he requested that such payment be made accordingly.

11. The said Francis Collison died at Herne Hill, London, on the 19th February, 1876, and petitioner understands that no trustee under the said will has been appointed in his place.

Wherefore your petitioner prays that this Honourable Court may be pleased to authorise the payment by the Master of the Supreme Court to the said Johann Adam Andre of the balance of the said capital sum and interest standing to the credit of his said late wife.

The Court granted the order, subject to production to the Master, and to his satisfaction, of the appointment of the above-mentioned Peter Zenz as counter-guardian to the minor children.

IN THE ESTATE OF THE LATE H. P. SMIT.

Mr. Graham moved for leave to the executrix to pass a bond to secure the balance of the purchase price of certain lot of ground, marked No. 4, in Burghersdorp, purchased by the said Smit under conditions now proposed to be carried into effect.

The order was granted.

IN THE INSOLVENT ESTATE OF LEWIS LATEGAAN.

Mr. Graham moved for authority to one of the trustees of the said estate to pass transfer of a certain share of the farm Welbedacht and Coetzerskraal to the purchaser thereof without the assistance of the joint trustee.

The Chief Justice: Why not remove the other trustee at once if he does not do his duty?

Mr. Graham said that course could be taken, but there were not many other acts in the estate to be carried out, and the present was thought the less expensive course.

Mr. Justice Smith was under the impression that in such a case the dilatory trustee should be removed at once and another trustee elected.

The order was granted.

IN RE THE PETITION OF ELIZABETH
C. JOUBERT.

Mr. Sheil moved for leave to petitioner to transfer certain share of landed property bequeathed to her by her mother, without the authority of the petitioner's husband thereto, he having deserted her and his present residence being unknown.

It appeared from the petition that petitioner and her husband were married out of community of property, but that the marital power had not been excluded.

It was provided in the contract that all inheritances, legacies, gifts, or bequests should belong solely to that one of the spouses to whom the same should have been lawfully given or bequeathed. Petitioner's husband deserted her in 1888, and since that year she had not heard from him nor had he contributed in any way to her support or to that of the children of the marriage.

Petitioner's mother, during her lifetime, had accumulated certain landed property, which was registered in her name in trust for all her children born or to be born.

Petitioner's mother died some time ago, and petitioner and her brother were appointed executors under the will.

By a codicil to the will petitioner's mother directed that the landed property should be sold within three months of her death and bequeathed the proceeds in equal shares to her ten children.

The children were anxious to carry out their mother's wishes as to the sale of the property, but the Registrar of Deeds refused to recognise the right of the executors to transfer the land registered in trust, and required the signatures of all the children to the powers of attorney required to transfer.

The other children as well as petitioner were

willing to sign the powers, but the Registrar of Deeds would not recognise petitioner's signature unless she were assisted by her husband.

Wherefore petitioner prayed that she might be empowered to give transfer of her one-tenth share of the property registered as aforesaid without the assistance of her husband.

The Chief Justice: Do not the recent rules cover a case like this ?*

Mr. Sheil: The petitioner applies in her individual capacity, and not as executrix. Continuing, counsel said that he was instructed that the Registrar of Deeds had withdrawn his opposition, and would now accept the signature of petitioner although she was not assisted by her husband. Counsel added that in the recent application of Mrs. Lippert, the Court granted a similar order. ("In re Maud Lippert's petition, 1 C.T.L.R., 258.")

The Chief Justice: There were special circumstances in that case, the sale being a forced one, and Lippert was supposed to be incapable of being found.

Mr. Sheil: Lippert's whereabouts could have been discovered with more certainty than those of the petitioner's husband in the present case.

The Chief Justice: This case differs from Mrs. Lippert's. There there was a forced sale, in the present case the proposed sale is voluntary. Again Lippert was a fugitive from justice, but in the present matter there is nothing of that kind. The applicant is, however, entitled to some relief, and the Court will grant a rule nisi calling on petitioner's husband to show cause why the order should not be granted as prayed, the rule to be published once in the *Government Gazette*, and to be made absolute without further application, unless the respondent should show cause before the 12th April.

* The Chief Justice referred to the Regulations framed under "The Deeds Registry Act, 1891," which came into operation on the 1st January, 1892, in the Deeds and Registry Offices, Cape Town, Kimberley, and King William's Town.

Section VI, Regulation 46, is to the following effect:

If a married woman applies to the Registrar to pass transfer of land belonging to the Estate of which she is executrix, the Registrar may allow the transfer if he is satisfied that the husband has received notice of the application; but when the husband has given notice of his intention to apply to the Court to prevent the transfer, the Registrar may refuse to allow the transfer until the Court has given its consent.—Ed.

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"CAPE TIMES" LAW REPORTS.

A RECORD

OF

EVERY MATTER DISPOSED OF IN THE SUPREME COURT,
DURING THE QUARTER ENDING 30TH JUNE, 1892.

EDITED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE
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"CAPE TIMES" LAW REPORTS.

SUPREME COURT.

(IN CHAMBERS).

[Before Sir J. H. DE VILLIERS, { 8th April, 1892.
K.C.M.G. (Chief Justice).]

IN RE PETITION OF DYER.

Mr. Searle moved on behalf of Frederick Dyer, father and natural guardian of Herbert Sydney Dyer, a minor, for leave to sell certain land situated at Keiskamma Hoek, purchased for the minor in 1884. Counsel stated that the land was bought for £805, and that an offer of £575 had recently been received for it, but that the Registrar of Deeds at King William's Town had refused to pass transfer without the express consent of the Court, that being the practice in cases where property was registered in the name of the minor.

The Chief Justice said that the Act specially prevented his doing so. There could be no transfer of a minor's property without the express consent of the Court.

Mr. Searle said that the Registrar had intimated that had the property been registered in the name of the father transfer would have been passed. Part of the proceeds were to be paid in cash and a bond would be given for the rest.

The order was granted; the cash proceeds of the sale to be paid into the Guardians' Fund.

IN THE ESTATE OF THE LATE WILLIAM ARMSTRONG.

Mr. Moltano moved on behalf of the executors in the estate of the late Wm. Armstrong for leave to raise a mortgage of £100 upon certain property in Cape Town, for the benefit of Mary Jane Armstrong, a beneficiary under the will. Counsel stated that the person sought to be benefited was a cripple, and had been left certain property on the condition that she did not mortgage or alienate it. All the heirs who would be benefited upon her death had agreed to raise £100 for her support, and the sanction of the Court was now asked to the arrangement.

The order was granted, the total sum to be raised not to exceed £112, including cost of the mortgage bond and the present application.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 12th April
K.C.M.G. (Chief Justice), Mr. { 1892.
Justice BUCHANAN, and Mr. {
Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

GREEN AND OTHERS V. SHIRLEY.

On the motion of Mr. Webber, the final adjudication of the defendant's estate was ordered.

VAN NOORDEN V. HAYES.

Mr. Moltano moved for provisional sentence for £50, with interest, upon a bond.

Provisional sentence was granted.

HALL AND CO. V. ESTERHUYSE.

Mr. Moltano moved for a writ of civil imprisonment on an unsatisfied judgment for £198 and costs.

Mr. Juta appeared for the respondent, and said that he was without assets, but that his wife, who was married to him by ante-nuptial contract, had offered the plaintiffs 4s. in the £, which, however they would not accept.

Mr. Moltano remarked that the very object of civil imprisonment was to make a man pay, and submitted that in a case like the present, where a man had rich relatives, if he were sent to prison they would soon pay up and get him out.

Mr. Justice Buchanan: This man's estate was sequestrated years ago, and the plaintiffs allow him large credit all the same. Does a shopkeeper deserve sympathy under such circumstances?

The Chief Justice said it was clear that the decree was applied for in order to squeeze money out of the wife. The application would be refused, but without costs.

BURMAN V. MYERS.

Mr. Webber applied for final adjudication of the defendant's estate, which was granted.

SOUTH AFRICAN LOAN AND MORTGAGE AGENCY V. M. RINGHAM.

Mr. Schreiner moved for provisional judgment for £850, with interest, upon a mortgage bond passed by defendant.

The order was granted.

STEYN'S EXECUTORS V. GROESER.

Mr. Maakew moved for provisional sentence for £225, due upon two bonds.

The order was granted.

TAIT V. P. J. HUGO.

Mr. Castens moved for a writ of civil imprisonment upon an unsatisfied judgment for £45 and costs.

Defendant who appeared in person said he was a labourer and had not the means to pay the money.

By Mr. Castens: He farmed a piece of land, but had no sheep or wheat. The money was owing for rent.

The Court refused to grant the order, the Chief Justice remarking that no good end would be served by sending defendant to prison. The only chance of payment was that he should be allowed to look after his crops.

COLONIAL ORPHAN CHAMBER V. W. L. KINGON.

Mr. Molteno moved for provisional sentence for £808, due upon a bond.

The order was granted.

BOARD OF EXECUTORS V. ROCHE'S EXECUTRIX.

Mr. Schreiner moved for provisional sentence for £650, with interest, due upon two mortgage bonds.

The order was granted.

SCHRENDER V. SLABBER.

Mr. Juta moved for final adjudication of the defendant's estate, which was granted.

SOUTH AFRICAN ASSOCIATION V. J. J. O'LEARY.

Mr. Maakew applied for the discharge of the provisional order in this case.

The order was granted.

WHITTINGHAM V. GRAY'S EXECUTORS.

Mr. Schreiner moved for compulsory sequestration of the defendant's estate.

The chief executor, Mrs. Gray, appeared, and stated that the business was a paying one, and would enable her in time to pay off the debts. She prayed the Court to refuse the order, the business being her only means of support, and the local creditors having agreed to the terms she proposed.

Mr. Schreiner stated that the chief creditors were a firm in London.

The Chief Justice said that the estate was clearly insolvent, and sequestration would therefore be adjudged.

KURANDA AND MARAIS V. LANGTON.

Mr. Molteno applied for provisional sentence for £942, with interest at 10 per cent., due upon a bill of exchange between the parties.

The order was granted.

VAN DER BYL AND CO. V. E. H. B. LANE AND ANOTHER.

Mr. Juta moved for provisional sentence upon a promissory note for £36 15s.

The order was granted.

GRAVES V. CATHCART.

Mr. Shiel moved for judgment for £58 18s., due upon an acknowledgment of debt.

The order was granted.

VERSFELD V. MYBURGH: DE LUNATICO INQUIRENDO.

Mr. Molteno for the plaintiff; Mr. Webber for the alleged lunatic.

This was an application to have the respondent declared of unsound mind, and to appoint a curator for his person. Petitioner, Maria Petronella Versfeld, said that the respondent was her brother. He was aged forty-five, and of very weak mind. He was entitled to a half interest in an amount of £1,600 invested by the South African Association. She would be willing that the Association should be declared curator of the estate, and she would undertake the care of his person. When the interest was paid the respondent would not sign the papers, and in other respects he was weak-minded.

Dr. Fisser deposed that he had examined the respondent. He could not keep up a proper conversation, and appeared unable to express an opinion. He was weak of mind, but not likely to be violent. He was not capable of taking care of his person or property.

Dr. J. Petersen said he had examined the respondent, who simply suffered from weak intellect. He considered that respondent was incapable of managing his affairs. If he committed a crime witness would not hold him responsible, and witness regarded him as unfit to enter into a contract.

The Court declared the respondent to be of unsound mind, and appointed the secretary of the South African Association curator of his property, and Mrs. Versveld curator of his person.

In re HEROLD.

Mr. Schreiner moved for the admission of Mr. Charles Willoughby Herold, as attorney and notary.

The admission was granted, and the oaths taken in court.

REHABILITATION.

On motions from the bar the Court granted the following rehabilitations: Petrus Johannes Louwrens, Paen, Annis Jacob Daniel de Bruyn, Hans Jacob Sural, deceased, and surviving spouse, Cornelia Sophia Jacoba Sural, Hendrik Phillipus Meller, Heinrich Clements, Julius Bremer, Gert Hendrik Kriek, Herman George Pfeil, Charles William Green, Petrus Johannes Jacobus Pienaar, Mathys Johannes Blom.

GENERAL MOTIONS.

PETITION OF ISAAC J. M. VAN NIEKERK.

Mr. Sheil moved to make absolute the rule nisi for cancellation in the Debt Registry of a certain bond for £100, passed by petitioner in favour of William Frederick Hohenkerk on the 20th May, 1871, hypothecating a share of the farm Klipfontein, in the district of Namaqualand.

The order was granted.

In re STEYNSBURG MILL COMPANY.

Mr. Watermeyer moved for an order in the terms of the report of the official liquidator. Counsel applied for the dissolution of the com-

pany, and said that all creditors had been paid in full. There was £24 remaining over, which the liquidator asked for as remuneration.

The order was granted.

In re THE MINORS MATTIG AND CLARKE.

Mr. Webber moved for an order relieving the tutor testamentary, Alexander C. Millar, of his trust, he being a resident in the Orange Free State, and unable to duly administer the affairs of the minors.

The order was granted.

REINERS VON LAEB & CO. V. FEHR.

Trade Mark—Infringement—Alleged colourable imitation—"Sun-brand Lager beer"
—Registration—38 and 39 Vic., cap. 91,
Sec. 6—Act 22 of 1877, Section 6.

Mr. Searle appeared for the applicants, and Mr. Schreiner, Q.C., for the respondent.

Mr. Searle moved for an order setting aside a certain objection lodged with the Registrar of Deeds by the respondent in respect of a trade mark for lager beer, proposed to be registered by the applicants.

It appeared from the affidavit of Mr. Rofles, a partner in the firm of Rofles, Nebel & Co., of Port Elizabeth and Kimberley, that the respondent, Hugo Fehr became, on the 7th July, 1888, the registered proprietor of the trade mark "Lager Bier, Bierbraueri zun Felsen, Burg—Registered;" the name of the beer being surmounted by a representation of a brilliant sun with the words "Lager Bier" underneath, the beverage which it protected being commonly known throughout the Colony as the "Sun Brand Lager Bier."

That deponent's customers when ordering this beer universally styled it either "Sun Brand Bier" or "Sun Brand Lager Bier."

That the trade mark sought to be registered by the applicants was similar to that of which the respondent was the registered proprietor, and was calculated to mislead the public in that whilst the emblem or figure portrayed in the label was stated to be a "Star," the words beneath, viz: the "Original Sun Brand Lager Bier" implied that the beer in respect of which the mark was sought to be registered was meant to be styled and known as "Sun Brand Bier."

That the applicants had previously endeavoured to register in respect of beer a trade mark similar to that of the respondent in regard to its distinguishing feature, namely, its being the "Sun Brand," but that such endeavours had been unsuccessful.

(Several other affidavits sworn to by merchants and others trading in the Colony were read some of which alleged that the respondent's beer was universally known as Sun Brand Bier and others, including the applicants that it was equally well known as "Burg Bier.")

Mr. Searle, in support of the application, contended that no one could mistake one label for the other. The applicants had for years used the trade mark, "Original Sun Brand" in connection with other articles which they sold, and they wished to apply it to their beer merely for the sake of uniformity, but they had no intention to infringe the respondents' trade mark or to deceive the public. Counsel referred to Act 22 of 1877, sections 1, 6, and 9, to Sebastian's Digest of Cases on Trade Marks, pages 254 and 279, and cases there cited; and to *Leather Cloth Company v. American Leather Cloth Company* (85, L.J., Ch. 58).

Mr. Schreiner: Apart from registration the right to a trade name can be acquired *per industriam*. In the present case the respondents' trade mark, "Sun Brand," is well known throughout South Africa, and the applicants are clearly attempting to register a colourable imitation.

Counsel referred to 38 and 39 Vic., cap. 91, sec. 6—to the Colonial Act, sec. 6, and to the following authorities, which he discussed at length: *Rose & Co. v. Miller* (decided in the High Court of the Transvaal in August, 1891); *Combrinck & Co. v. De Kock* (5 Juta, 405); *Levy's case* (High Court); *Wotherspoon v. Currie* (5 L.R.H.L., 508); *Cooks v. Chandler* (11 L.R. Eq., 446); *Siebert v. Lindlater* (7 L.R. Ch., Div. 801). *In re Worthington's Trade Mark* (14 Ch., Div. 8); *Johnston v. Orr Ewing* (7 App., Cas. 219); *Singer Manufacturing Company v. Wilson* (3 App., Cas. 376); *Hendriks v. Montague* (17 Ch., Div. 688); *Seixo v. Provezende* (L.R. 1 Ch. App. Cas. 192); and *Read v. Richardson* (45, L.T. 54).

Mr. Searle was not allowed to conclude his argument in reply.

The Chief Justice, in giving judgment, said that he quite agreed with the remark made by one of the judges in one of the cases cited that it was impossible to lay down any general rule as to what would amount to an infringement of a trade mark, and as to what formed a colourable imitation calculated to deceive. Every case must be decided on its own merits. In the present case, whether he placed the two labels before him side by side or looked at one after the other, he was satisfied that no ordinary person would be misled. Both labels were oblong, no doubt, but that was the ordinary shape of such labels. In the case of "*In re Worthington & Co.'s Trade Mark*" there was a distinctive geometrical figure, and the figure which the defendant in that case sought to use was certainly calculated to mislead and deceive.

Looking at the present case from the point of view which a jury would take he was satisfied that an ordinary person would not be deceived if the applicant's mark were allowed to be registered. The applicant, it was true, used the term "lager" beer, but Mr. Schreiner had not attempted to say that that had a distinctive meaning. He (Mr. Schreiner) relied mainly on the circumstance that on the original label there was the figure of a sun, and he argued from that that the respondent was entitled not only to the mark of the sun but also to the words "sun brand," and he said that in certain advertisements of the respondent the words "sun brand" were used, but he (the Chief Justice) found that by advertisements put in the advertisers themselves seemed to have doubted as to whether "sun brand lager beer" by itself would convey a distinctive meaning, and so the word "Burg" had also been inserted. If it were clear that these words "sun brand" had attained a certain definite meaning the case would be somewhat different, but there was as much to be said on one side as on the other. The applicants produced testimony that as often as not the respondents' beer was called "Burg beer," and they produced an advertisement where that description was used. Under those circumstances the applicants were entitled to ask the Court to register their trade mark. It was for the Court to decide whether the trade mark was calculated to deceive, and the fact that in the opinion of the Court the words used by the applicant were not calculated to deceive ought to be conclusive in the present case. He did not think that the English cases had been of much assistance, though they would have been had the words "sunbrand" appeared on the original label. On the other hand, however, it would have been competent for the respondents outside the Act at all, to show that there had been an attempt at fraud on the part of the applicants, and if he had believed that such was the case he would have refused the assistance of the Court to the applicants, but he was satisfied that there had been no such intention to defraud. The applicants had used the words "sun brand" for several years in regard to other articles, and they now proposed to use them in respect of this particular beer, and inasmuch as the respondents had not acquired a distinctive title to the words he was of opinion that the application ought to be granted. There was this to be said, however, that seeing that the words "sun brand" appeared beneath a star, on the applicant's label, it might be said that the intention was that the star should be taken for a sun, and as Mr. Searle had expressed the willingness of the applicants to withdraw the device of the star the application would be granted with costs, but

on the condition that the star be omitted from the mark.

Mr. Justice Upington concurred.

[Applicants' Attorneys, Messrs. van Zyl & Buissinne; Respondents' Attorneys, Messrs. Scanlen and Syfret.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. } 13th April,
Justice BUCHANAN, and Mr. } 1892.
Justice UPINGTON, K.C.M.G.]

VOGEL V. VOGEL.

Mr. Searle moved to make absolute the rule nisi for transfer by the Sheriff of the Colony to applicant of a half share in a certain farm known as Montzie, in the district of Maclear.

The order was granted.

TEBB V. JACOBSON.

Mr. Schreiner moved to make absolute the rule nisi, interdicting the respondent from breaking down or interfering with a certain wall, dividing the properties of the applicant and respondent in Mill-street, Cape Town. Counsel stated that the dispute had arisen between two residents of the Gardens, the respondent contending that a wall which had been upon the applicant's property for many years really belonged to the adjoining property, which he had recently acquired.

The Chief Justice asked if the case were one which the Court could settle on motion?

Mr. Schreiner said that there was a direct conflict between two surveyors. He suggested that the interdict should be allowed to continue pending an action to be instituted by the respondent.

Mr. Searle, who appeared for the respondent, said he could not assent to that course.

The Court ordered the application to stand over till Tuesday next, the interdict to continue in the meanwhile. The Chief Justice remarked that he hoped the parties would settle what appeared to be a most trivial matter.

IN RE THE MINOR ELLEN E. WHYTSE.

Mr. Juta moved for leave to the father and natural guardian of the minor to pass transfer of a certain lot of ground in New Church-street, Cape Town, registered in the name of the said minor, the proceeds of the sale of the land to be paid into the Guardians' Fund.

The order was granted, the sum of £60 to be paid into the Guardians' Fund to the credit of the minor.

IN THE ESTATE OF THE LATE CORNELIUS
C. HUGO.

Mr. Juta moved for leave to sell certain two lots of ground at Diep River, marked Nos. 10 and 11, bequeathed to Petrus Jacobus Hugo, by whom the bequest had been repudiated, and to dispose of the proceeds as if no testamentary disposition had been made on the said land. It appeared that by the will of the legatee's parents the land was left to him upon the condition that in the event of his death it should go to his offspring or nearest relative, but should never be sold. The land was valued at £100, and there was about £8 due as charges upon it. The executors now applied that the land might be sold for the benefit of the estate.

The order was granted, the Chief Justice remarking that the will was obscure in its language, and there was a doubt as to whether the testators intended to create a *fidei commissum*.

FUCHS V. BOONZAIER.

Mr. Searle moved for an order directing the executor of the said estate to amend the liquidation account thereof, by awarding to the applicant Johanna A. Fuchs (born Boonzaier) the amount of inheritance accruing to her out of the estate of her deceased parent.

Mr. Schreiner, Q.C., appeared for the respondent (the executor of the estate of the late Francois Hendrickus Boonzaier).

It appeared from the applicant's affidavit that she was the daughter of the late F. H. Boonzaier and his predeceased spouse, Petronella Maria Boonzaier (born Daniell). That her parents executed a joint will on the 4th January, 1852. That her mother died in November, 1862, and that her father remained in possession of the joint estate in terms of the will. That on the 10th September, 1890, the survivor executed a will, whereby he appointed applicant, and the four other children of the marriage, his heirs, and on the 2nd October, 1890, executed a codicil, whereby he burdened applicant's share of the inheritance with a bond of *fidei commissum*. That the respondent had framed an account burdening applicant's share of inheritance with a *fidei commissum*, to which she had filed an objection. The applicant claimed that the said account should be framed in accordance with the joint will of her parents, and prayed that the respondent might be ordered to amend it accordingly with costs of suit.

Mr. Schreiner, for the respondent, said that the executor was in this position that applicant's father had not paid her her inheritance, and it was now difficult to ascertain what was exactly her due.

The Court ordered the accounts in the estate to be so amended as to award to the petitioner her maternal inheritance free and unencumbered, and her paternal inheritance subject to a *fidei commissum* imposed by the father's will. Costs to come out of the joint estate.

THE ESTATE OF THE LATE COENRAAD W. MEYER.

Mr. Schreiner moved to make absolute the rule nisi for cancellation in the Debt Registry of a certain mortgage bond for £112, dated 16th August, 1862, hypothecating a certain house and premises in Cape Town, passed by the widow and executrix of the said Meyer in favour of Louis F. Agron.

The order was granted.

UDEMANS V. UDEMANS.

Mr. Juta moved to make absolute the rule nisi admitting applicant to sue in *forma pauperis* in an action against his wife for divorce by reason of her adultery.

The order was granted.

PAARL BANK, IN LIQUIDATION, V. HUGO'S EXECUTORS.

Mr. Schreiner, Q.C., moved for an order amend ing the list of contributories to the said bank by placing thereon the executors of the said Hugo (Messrs. G. J. Joubert and F. P. Retief) in lieu of the estate, in respect of sixty-three shares, and requiring the said executors to pay *de bonis propriis* the calls on such shares to the extent of the sum distributed by them as such executors.

Mr. Molteno appeared for the second-named respondent (Mr. F. P. Retief) and read his affidavit, which *inter alia* was to the following effect:

I annex hereto a receipt for the sum of £75, as a deposit for a compromise entered into between myself and the liquidators of the said Paarl Bank. This compromise is in full discharge of all my liability to the said Paarl Bank, and was confirmed by this honourable Court about two or three months ago.

Under this discharge I claim to be freed from all further personal liability towards the said bank, and offer this in opposition to section (c) of the prayer of the applicants' petition calling upon me to pay *de bonis propriis*.

I offer no objection to judgment being entered against the estate, of which I am one of the executors *dativo*.

Mr. Molteno contended that the receipt amounted to an absolute release, and that no part of the applicants' affidavit which attempted to vary the terms of the contract as disclosed in the receipt, should be admitted.

Mr. Schreiner, in reply, pointed out that the receipt referred to in Mr. Retief's affidavit was in respect of a compromise of £75 accepted by the liquidators in discharge of a specific debt of £1,004 due by Retief to the bank on certain promissory notes, but had no connection whatever with the position of the respondent as one of the executors of Hugo's estate.

The Chief Justice, in giving judgment, said that the first question to be decided was as to whether there was any personal liability. Mr. Molteno had argued that the debt had been wiped out by virtue of a compromise, but the only legal compromises were those confirmed by the Court. But even the receipt itself was not conclusive. It lay on the respondent to show that the personal liability had been wiped out, and this had not been done. The respondents would have to be made liable, though they had their remedy against the legatees.

The order was granted, with costs of opposition against Retief.

IN THE ESTATE OF THE LATE CHARLES MCMASTER.

Mr. Shiel moved to make absolute the rule nisi for the registration of the title in the name of the said estate of a certain lot of ground, part of the farm Eastford, in the village of Knysna, bought in 1877, but still remaining registered in the names of the sellers.

The order was granted.

IN THE INSOLVENT ESTATE OF AUGUST F. H. SIEBERT.

Mr. Schreiner moved for an extension of seven months within which to file an account and plan of distribution of the said estate, owing to a delay in the realisation of the assets thereof by reason of a lawsuit instituted by the trustee.

The order was granted.

IN RE CLARK'S ZOUTPANSBERG EXPLORATION AND GOLD-MINING COMPANY.

Mr. Juta moved for an order confirming the appointment by the High Court of Justice of the South African Republic of the liquidators of the said company, to enable such liquidators to institute legal proceedings in this colony.

Mr. Justice Upington said that he could take no part in the decision, as he had been a member of a committee appointed to inquire into the affairs of this company.

The Chief Justice asked why the petitioners did not sue without asking that the appointment should be confirmed by the Court.

Mr. Juta said that there was a difficulty, it being felt that security for costs would have to be given every time they sued, because the petitioners were domiciled in the Transvaal.

The Chief Justice said that whatever might be done by the Transvaal Courts, he thought that the Courts of Justice in the Cape Colony should by courtesy recognise the appointment of official liquidators in the Transvaal so far as moveables were concerned. The official liquidators appointed in the Transvaal would have a *locus standi* to sue any debtors in the Cape Colony, on satisfactory proof of their appointment and that they were entitled to sue. In the present case the liquidators seemed anxious to avoid giving security. The Court frequently confirmed the appointment of executors, but never of liquidators. There would be no order upon the present application.

LUYT V. SCHREIBER.

Mr. Schreiner moved that the rule *nisi* interdicting a sale in execution be continued for three weeks longer. Counsel stated that applicant bought a property from respondent, and was in enjoyment of it, but had not yet paid the purchase price. The property was placed under an order of execution at the suit of Messrs. White, Muller & Co. The debt due to that firm had been reduced to about £40, and upon payment of that sum, which would take place in about three weeks, the property would be released, and the transfer to the applicant could then go through.

The Court ordered the rule to continue in force until the first day of next term.

PETITION OF HENDRIK J. J. LANDMANN.

Mr. Searle moved for an extension of the return day of the rule *nisi* against the widow of the late Petrus Stephanus Weyers until May 16.

The order was granted, one publication in the *Volkstem* failing personal service.

In re THE ESTATE OF JAMES ROBERTS.

Insolvency—Ordinance 6 of 1843, Section 110—Objection by insolvent to mode of distribution—*Locus standi*—Amendment of account—Costs.

Mr. Juta moved for an amendment of certain accounts in the liquidation of petitioner's insolvent estate, by disallowing a payment of £268 19s. 8d. in respect of a proof of debt for £705 8s. 7d., claimed by the liquidators of the Cape of Good Hope Bank under the cession of a certain bond. Counsel stated that some years ago applicant consented to the cession of a bond in favour of himself and his brother for £2,000 to the Cape of Good Hope Bank, as collateral security to the bank for the debts of John Roberts to the extent of £1,200, and for those of Henry Roberts and Benjamin Roberts to the extent of £800. The bank contended that there was still an indebtedness to them of £705, and they had claimed that against the estate of the insolvent, who submitted that the £800 had been paid off, and the obligation in respect of the £1,200 discharged.

Mr. Schreiner appeared for the liquidators of the Cape of Good Hope Bank, and raised the initial objection that the insolvent had no *locus standi*, and could not come into court alone and unaided by his trustee.

Mr. Juta said that the £800 had been paid off, but the bank contended that the security on behalf of Henry and Benjamin Roberts was a continuing one, and that as there was still £705 due from them the insolvent's estate was liable.

Mr. Schreiner said that the trustee had administered the estate for four years, and until now the insolvent had never sought to impeach that administration. He contended that an insolvent under such circumstances was not free to come before the Court alone, particularly in view of the fact that there was a deficiency in the estate of over £8,000, and that he could not possibly benefit by the amendment he now sought to obtain.

Mr. Juta argued that under section 110 of the Ordinance every insolvent could object to the liquidation accounts of his estate.

The Chief Justice agreed that the cases reported went to show that the insolvent could not sue on behalf of the estate unless he were assisted by the trustee, but that was a very different thing from an insolvent objecting to the mode of distribution of the assets. He was of opinion that the insolvent had a *locus standi*, and the preliminary objection would be overruled.

Postea (April 19th).

Mr. Juta moved for an order amending the second account and plan of distribution framed by the trustees by disallowing a proposed award to the bank of £268 19s. 8d. in respect of a proof made by the said bank of a sum of £705 8s. 7d. claimed to be secured under a cession by John Roberts of a bond passed by the insolvent in his favour dated 20th October, 1878, and to expunge and set aside the said proof of debt on the

ground that the condition of the cession of the bond, in respect of which such proof was made, had been satisfied by payment made by or on behalf of Henry and Benjamin Roberts to the said bank after the date of the said cession of sums in excess of the £800 in the said cession mentioned, namely, the respective sums of £957 10s., £1,557 10s., and £256 9s. 6d., or together £2,771 9s. 6d.

After argument,

The Court ordered the second account to be amended by awarding no preference to the Cape of Good Hope Bank. The applicant to have his costs.

In re THE PAARL BANK.

Liquidators' Report.

Mr. Schreiner presented, on behalf of the official liquidators, their second report in respect of the winding-up of the said bank. The report was as follows:

In presenting their second report the official liquidators beg to submit for the information of your honourable Court the following summary of the various receipts and payments, which will convey concisely and clearly the actual position of affairs as at present, and also the progress of the liquidation since the date of their appointment, at which time the total liabilities of the bank (exclusive of shareholders' capital), according to the books, were as follows:

DEPOSITS.				
	£	s. d.	£	s. d.
Fixed... ..	148,256	0 11		
Floating	44,022	16 8		
			187,278	17 2
Notes outstanding			4,170	0 0
Unpaid dividends			850	18 0
Loans			26,750	0 0
			£219,049	10 2

Of the above the following have been proved for and claimed up to day, viz.:

DEPOSITS.				
Fixed and interest... ..	£147,101	7 8		
Floating	48,540	6 8		
			£190,641	18 6
Notes			2,805	0 0
Sundry accounts			99	17 2
Loans	26,750	0 0		
Less securities realised	28,291	16 6		
Less securities unrealised	8,458	8 6		
			26,750	0 0
From which must be deducted claims settled by sets-off			9,808	18 2
Leaving a balance of			£184,242	17 6

on which three dividends, aggregating 8s in the £, have been paid, showing an amount of £110,545 14s. 6d. still to be provided for, which the liquidators regret cannot be met, even if every remaining shareholder is excused. The result of realisation of the assets has thus far distinctly confirmed the impression which was created by previous investigations, and to which reference was made in the first report. The effect of the call already made has brought out most prominently the inability of shareholders to meet the large deficiency still due to creditors. From the figures above stated it will be seen that a sum of £78,697 8s. has already been paid to the creditors of this institution, the sources from which this sum are derived being as follows:

Contributions on account of call ...	£40,248	10 1
Assets realised... ..	20,504	2 4
Dividend insolvent estates	14,108	8 8

£74,861 1 1

It is estimated that the assets on hand, after making allowance for bad and doubtful debts, will yield £87,819 16s. 8d., and a further sum of £27,594 6s. 10d. it is considered will yet be paid on account of the present call, leaving an estimated deficiency of £45,181 12s. 5d. still to be provided for. The liquidators will therefore have to face the disagreeable fact of asking this honourable Court to impose a further call, and would suggest that the amount be fixed at £500 per share, payable at once. However serious the amount of the call proposed by the liquidators may appear to be, the result of the liquidation will be of little importance, as it is not expected to yield more than £8,000, and will at the same time have the effect of leaving no solvents contributory on the present list. Some of the assets of the bank have decidedly improved in value, but not to an extent sufficient to make any material alteration in the estimate of the liquidators already put before this honourable Court. The liquidators have succeeded in disposing of the bank premises at the Paarl for £2 200. This property figures in the bank books at £3,818. Everything considered, the sale may be looked upon as a satisfactory one. The liquidators having in view the reduction as far as possible of all expenses, deemed it their unpleasant duty to discharge all the employees of the bank, with one necessary exception, and the liquidation is carried on as economically as is possible and consistent with efficiency. As the liquidators have now been in office for a period of fifteen months without remuneration, they respectfully desire this honourable Court to fix the amount of remuneration in respect of past and future services.

STATEMENT OF ASSETS AND LIABILITIES ON
APRIL 7.

LIABILITIES.			
To banknotes filed	£1,865	0	0
Fixed deposits... ..	88,069	1	7
Floating deposits	26,051	14	8
Sundry accounts	59	18	8
	£101,545	14	6
To balance	£45,121	12	5
ASSETS.			
By valuation of all assets still un- realised	£37,819	15	8
Estimated calls and compromises with contributories	27,594	6	10
Balance	45,181	12	5
	£110,545	14	6

The Court made the usual order for the publication and inspection of the report, and the Chief Justice said he was afraid that the call would have to be made, and the unfortunate shareholders squeezed as far as possible. The Court would grant a rule nisi, calling upon contributories to show cause why a further call of £500 per share should not be made.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 19th April,
Justice BUCHANAN, and Mr. 1892.
Justice UPINGTON, K.C.M.G.]

TRUSTEES INSOLVENT ESTATE SCHNITZLER AND PEYCKE V. SCHNITZLER.

Insolvency—Claim by wife on husband's estate—Ante-nuptial contract executed in Germany—Non-registration—Act 21 of 1875—Objection to confirmation of account—Delay—Ordinance 6 of 1843, Section 111—Objection expunged.

Mr. Juta appeared for the applicants, and Mr. Schreiner, Q.C., for the respondent.

Mr. Juta moved for an order expunging the objection filed by Emilie Schnitzler against the confirmation of the first account and plan of distribution in the said estate. It appeared from the affidavit of Mr. Monat, one of the trustees, that an objection was lodged on the 8th February, 1892 to the confirmation of the first liquidation and,

distribution account by Mrs. Emilie Mathilde Schnitzler and Mr. Carl Schnitzler, on the following grounds:

1. That an amount of £1,829 8s. 4d. has been set aside by the trustees to meet Emilie Mathilde Schnitzler's supposed claim of £15,000, and that such amount will not be sufficient to yield a dividend upon such claim equal to that now awarded to creditors.

2. That an action is pending in the Eastern Districts Court by which the said Emilie Mathilde Schnitzler is seeking to have her claim admitted, and a commission has been granted to take evidence in Germany.

3. That the costs of this action will be very heavy, and should the said Emilie M. Schnitzler succeed the costs will have to be paid by this estate, and that the trustees have made no provision for the payment of these costs, and she will suffer serious loss and damage consequently.

That the remaining assets in the estate were set down in the account filed at a minimum of £1,846 8s. 8d., making a total of £3,475 7s.

That a dividend had been declared of 8s. in the £, that 8s. in the £ on £15,000 amounted to £2,250, which left a margin of at least £1,225 for possible law costs in remote contingency of Emilie M. Schnitzler succeeding in her action against the estate.

That the private estate of Carl Schnitzler was also insolvent, and that no ante-nuptial contract of himself and Emilie Mathilde Schnitzler, his wife, both domiciled in Port Elizabeth had been registered in this Colony as required by Act 21 of 1875.

That Emilie Mathilde Schnitzler had delayed in bringing her action against the estate and that some hundreds of pounds had been locked up for twelve months in consequence, and that some creditors were anxious to receive their dividends.

That since Emilie Mathilde Schnitzler lodged her objections a reasonable time had elapsed to move the Court as required by Section 111 of Ordinance 6 of 1843.

Mrs. Schnitzler's attorney in his answering affidavit to the above stated *inter alia* that his client was desirous of having the point of non-registration of her marriage contract settled without delay in the case of Schnitzler v. The Trustees of Schnitzler and Peycke and that the pleadings were amended by mutual consent for that purpose, amended pleadings were thereafter filed by the defendants, to which the plaintiff was advised by counsel no such exception could be taken and the action had therefore to proceed in the ordinary course.

That at the time the said Carl Schnitzler and Emilie Mathilde Schnitzler were married they were domiciled in Germany and married by ante-nuptial contract according to the laws of Germany

and that a copy of such contract had been supplied to the defendants.

That it was untrue that Mrs. Schnitzler had delayed in bringing her action, for proceedings were taken within forty-eight hours after the refusal of the Magistrate to admit the proof of debt.

That the reason why the Court had not been moved before was because the Master stated that the account would not be submitted for confirmation until April 16th, and that on receiving a telegram to that effect from Cape Town in the early part of February he (deponent) communicated such fact to Mr. Hazell, one of the attorneys for the Trustees as well as to Messrs. Craven and Denny, two of the Trustees.

Mr. Schreiner, Q.C., contented that the proposed dividend of 8s. in the £ should be reduced to 2s. 6d. so as to make ample provision for Mrs. Schnitzler's claim in the event of her being successful in her action against the Trustees. In any event the law costs would be heavy as two commissions were taking evidence in Germany, one in Cologne and the other in Berlin, and it was very uncertain what the remaining assets would realize.

The Court ordered the objection to be expunged with costs.

THOMAS V. THOMAS.

Mr. McLachlan moved for extension of the return day to the rule nisi admitting applicant to sue *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

The order was granted, the return day being extended until the 9th June.

BEHARDIEN V. HEINEMAN.

Nuisance—Rain water—Servitude—Interdict.

Mr. Searle appeared for the applicant, and Mr. Schreiner, Q.C., for the respondent.

Mr. Searle moved to make absolute the rule nisi for an interdict restraining the respondent from allowing drainage and refuse water to flow from his property on to that of the applicant, situated in Loop-street, Cape Town, and for costs.

It appeared from the affidavit of the applicant, Hadje Behardien, who owns a house next to the respondent's in Loop-street, and which is at present occupied by the Government as stables for the Post Office horses, that the respondent had a servitude to allow rain-water to run beneath his (applicant's) house, but that he had permitted

offensive refuse to flow through the drain, and rendered his (applicant's) premises almost uninhabitable. In spite of repeated requests, respondent had done nothing to abate the nuisance.

The Chief Justice remarked that he granted the interdict because he was greatly influenced by the fact that the water flowed under a room occupied by the applicant, and though the affidavits did not state it, he hoped they now would state whether the room was built before or after servitude was acquired.

Mr. Searle said he did not know how that was, and remarked that the real question was whether a nuisance was caused to the applicant who contended that the respondent did not confine himself to rain water.

The Chief Justice:—I would have been inclined to let the applicant bring an action, unless it were that further occupation of the house might be injurious to health.

Mr. Schreiner said the fact was that there was no other way for the slop water to run down from the stables. The water had so run for fifty years, and the respondent would for one thing rely upon his prescriptive right. Then as a fact there was not a single occupation room all along the line of the drain, and the room under which the drain ran was an old lumber place, in which, at the time of a visit by one of the sanitary officers decaying vegetables and other objectional matter were found. Further, the respondent alleged that if there were any nuisance at all it was caused by the insanitary condition of the applicant's premises. Mr. Joseph Corben, the Chief Sanitary Inspector, had made an affidavit to the effect that the sluic and premises were in a clean condition.

Mr. Justice Buchanan suggested that the best thing would be to provide a covered drain.

Mr. Schreiner said the only people who could do that were the Town Council, who would no doubt be ready to do something, if they would maintain that spirit of energy and vigour in sanitary matters which had been exhibited for some time past.

The Chief Justice:—But the Mayor is not yet on his way out, Mr. Schreiner.

Mr. Searle then proceeded to read various affidavits in support of the motion, that of the applicant containing the statement in addition to what he had already said, that he and the managing clerk of his solicitor examined the drain, and he (Behardien) placed some of the solid offensive matter in an empty butter tin, which, by the advice of his solicitor, he had kept.

Dr. J. Petersen's affidavit showed that the drain was full of matter emitting an offensive odour, which he considered was deleterious to health, and likely to cause diphtheria and typhoid fever.

Mr. Searle submitted that no one could establish a nuisance by prescription.

After further argument,

The Chief Justice in giving judgment said the applicant's affidavits clearly established the fact that obnoxious and offensive matter had been allowed to flow down the drain. The Court would make the rule absolute with costs, with leave to respondent to apply to set the order aside.

PETITION OF ANGELO RUMI.

Mr. Juts, on behalf of applicant, moved for leave to sue by edictal citation in an action against his wife for divorce by reason of adultery.

The order was granted.

In re THE PETITION OF SCHALK CAREL WILLEM VORSTER AND ANOTHER.

Transfer of land—Fractional parts—Solemn declaration—Registrar of Deeds—Discretion—Act 19 of 1891, Section 11.

Mr. Schreiner moved for authority to the Registrar of Deeds to pass transfer to petitioner of a certain defined share of the farm Nooitgedacht, in the district of Middelburg, without production of a declaration in terms of section 11 of the Deeds Registry Act of 1891, such share having been purchased by petitioner in 1883, but an erroneous extent transferred to him.

The Assistant Registrar of Deeds had refused to pass transfer, being of opinion that he was precluded from doing so by Act 19 of 1891, section 11.

After argument,

The Chief Justice said the Registrar was justified in raising the objection, but at the same time there were special circumstances in this case. The sale took place before the Act of 1891 was passed. The Court would express its opinion, for the guidance of the Registrar, that under the special circumstances of the case he would be quite justified in exercising his discretion in such a manner as to authorise the transfer as prayed certain alterations to be made, however, in regard to the fractional parts of the land, so as to make it more in accordance with the usages of the Deeds Office. There would be no order on the application.

DUTCH REFORMED CHURCH, MIDDELBURG V. DU PREEZ.

Mr. Shell moved for leave to the churchwardens of the said church at Middelburg to sue by edictal

citation in an action against the respondent for recovery of the amount of a mortgage bond and interest.

The Court granted leave to attach the property mortgaged *ad fundandam jurisdictionem*, and to sue by edictal citation, returnable May 16. Failing personal service, one publication to be made in the *Gazette* and one in the *Transvaal Volksstem*.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. } 20th April,
Justice BUCHANAN, and Mr. } 1892.
Justice UPINGTON, K.C.M.G.]

THOMPSON V. OKES AND NAUDE.

Municipality—Election of Commissioners—Votes—Resident householders—Ordinance 9 of 1836, Sections 12 and 48—Act 13 of 1864, Sections 3 and 7.

Owners of houses in a Municipality are entitled to vote at an election of Commissioners although they have not their ordinary places of residence in such Municipality.

Mr. Searle appeared for the applicant, and Mr. Schreiner, Q.C., for the respondents.

This was an application, partly heard yesterday, for an order declaring applicant to have been duly elected a Commissioner of the Municipality of Middelburg at the triennial meeting held for the election on the 29th February last, and setting aside the tie between the applicant and the said Naude declared by the Resident Magistrate.

This application raised an important question as to whether persons owning property within a municipality, but who were not actually resident in it, were entitled to vote at an election of commissioners.

It appeared from the affidavit of applicant that on Monday, the 29th February, 1892, the meeting for the triennial election of five Commissioners for the Municipality of Middelburg took place before Mr. Holt Okes, R.M., who had convened said meeting in terms of section 12 of Ordinance 9 of 1836, and section 3 of Act 13 of 1864, and who presided as chairman at the said meeting.

That before the actual voting commenced, the Resident Magistrate's attention was specially directed to the fact that by section 12 of Ordinance 9 of 1836 the aforesaid meeting should have been

convened and composed of the resident householders residing within the limits fixed by the Municipality by the Municipal regulations then in force, and that only resident householders residing within the Municipality and present at the meeting should be entitled to vote and elect the said five Commissioners.

That the Municipal regulations now in force fixed the town of Middelburg and the common pasture lands belonging thereto as the limits of the Municipality of Middelburg.

That notwithstanding the foregoing the said Resident Magistrate ruled that every resident householder, whether residing in the country or within the limits of the said Municipality, could vote at said meeting.

That thereupon twenty-one householders who did not reside within the limits of the Municipality, but at their respective farms in the district of Middelburg, were allowed to vote, and the Magistrate recorded their votes for the respondent Willem Jacobus Naude.

That thereupon the applicant formally protested against, as he alleged, the erroneous ruling of the Magistrate, and had his protest recorded, but the twenty-one votes above referred to were allowed by him (the Magistrate) for the respondent Naude.

That at the close of the voting the Magistrate declared that certain four resident householders who had the majority recorded for them were duly elected, and that for the fifth seat on the Board of Commissioners there was a tie between applicant and the respondent Naude, each having had fifty-four votes recorded in his favour, and that the said equality of votes precluded him (the Magistrate) from declaring either applicant or Naude elected a Commissioner.

That had the Magistrate not allowed the aforesaid twenty-one non-residents to record their votes for Naude, applicant would have had a large majority of votes as against the votes for Naude, namely, fifty-four against his thirty-three, and that accordingly he (applicant) claimed the fifth seat on the Board of Commissioners for the Municipality of Middelburg.

That on the 2nd March applicant instructed his agents to write to the Resident Magistrate requesting him, *inter alia*, to take no further steps in the matter of the election pending application being made to the Supreme Court in the matter.

Further, that on scrutinising the votes recorded for Naude at the triennial meeting for the election of Commissioners above referred to it was found that five persons who had voted were not qualified voters (as the applicant alleged), and that had the said five votes not been recorded and counted for the respondent Naude he would have received fewer votes than applicant, and the latter would have been declared the duly-elected fifth Commissioner.

That upon these latter, as well as his previous reasons he (applicant) claimed the fifth seat as a Commissioner for the Middelburg Municipality.

The affidavit of the first-named respondent, the Resident Magistrate of Middelburg, was to the following effect:

1. I am one of the respondents in the above matter, and Civil Commissioner and Resident Magistrate at Middelburg

2. I have read the affidavits of the appellant sworn to on the 2nd March, 1892, and 23rd March, 1892; as also the affidavit of Alwyn Petrus Smit, sworn to on 23rd March, 1892.

3. I called the meeting referred to in applicant's affidavit of the 2nd March, 1892, and presided.

4. There was much interest manifested in the election for Municipal Commissioners. For five vacancies existing nine duly-qualified candidates were nominated, and the court-room was crowded with people.

5. In the absence of a voters' list, which does not exist, I held that I would take the votes down in writing, and when everyone present who was qualified had voted, that I would declare the result of the election.

6. The appellant and his agent Wentzel thereupon required me to refuse to accept the votes of those resident householders who, although they were occupiers of property as renters and owners of the yearly value of £10 and upwards, did not permanently reside within the limits of the Municipality.

7. As these persons appear to me qualified under section 7 of Act 8 of 1864, and pay Municipal taxes on the town properties owned and occupied by them, I did not consider that the law laid it down clearly that they were debarred from their privileges to vote simply because they reside on their farms and occupy their town houses at stated times only, I therefore allowed them to vote, and the farmers mentioned in paragraph 5 of appellant's affidavit of the 2nd March, 1892, did vote at the election.

8. Whilst taking down the votes in writing several resident householders were desirous of challenging some of the voters. It was thereupon suggested by the appellant Thompson himself:

(a) That every person present desirous of voting be allowed to have his vote provisionally recorded.

(b) That after all persons present desirous of voting had done so the list should be closed.

(c) That the candidates or their representatives should then have an opportunity before the votes were added to challenge any man's vote for want of qualification.

(d) That if the challenges be well founded the names of such challenged persons be expunged from the list.

(e) That when all parties concerned had com-

pleted their challenges the votes should be added, and the result announced.

(f) That candidates abide by the figures there given, barring the right to appeal from the decision of the chair in reference to the reading of the law as mentioned in paragraph 3 of appellant's affidavit of the 2nd March, 1892.

9. The suggestion of the appellant was acquiesced in by Nicholas Frederic de Vaal, who represented the respondent Naude, and no one objecting, it was acted upon and carried out in its entirety, the appellant and respondent, Naude's agent, standing by the voting table and watching proceedings.

10. When all persons desirous of voting had done so appellant challenged several names, which were allowed, for good reasons, admitted by all parties. Respondent, Naude's agent, also challenged several names, which were also allowed, for equally good reasons, by all concerned.

11. The said names were therefore erased by me from the list.

12. When the appellant and respondent, Naude's agent, knew of no name on the list whom they could still challenge they informed me that they had finished and were satisfied to abide by the result, save and except the decision of the Appeal Court on the point of law raised in paragraph 3 of appellant's affidavit.

13. No one else being desirous of making any further challenge, I added up the votes and found that Bennie Enslin, Hewson, and Thuenissen had a majority, whilst there was a tie between appellant and respondent Naude, each having received fifty-four votes.

14. I therefore declared four vacancies filled, and adjourned the meeting.

15. Appellant at that time declared himself perfectly satisfied, stating, "Well, the best thing to do now is for either Naude or myself to withdraw."

16. The votes of L. S. Lessing, Piet Joubert, Willem van Wyk, Piet Jansen, and W. J. Pretorius, mentioned in Smit's affidavit as being those of unqualified persons, were not objected to by anyone at the meeting, and hence allowed by me, as I deem them possessed of the necessary qualification.

17. The appellant and Smit had every opportunity to challenge them at that time, but did not do so.

18. I called the second meeting to fill the vacancy for the fifth seat, being thereunto required by a written request of three resident householders in terms of section 5 of Act 18 of 1864.

19. I did not feel at liberty to disregard this request, as I do not agree with appellant's reading of the law.

20. At the second meeting respondent Naude was properly elected; appellant's name was not proposed. After reading his protest he left the room.

Mr. Searle, for the applicant, contended that farmers who lived in the division of Middelburg and who had houses in the town of Middelburg which they only occasionally occupied were not entitled to vote for Commissioners for that town. (Counsel referred to Ordinance 9 of 1836, sections 1, 12, and 48; Ordinance 2 of 1844, section 4; Act 18 of 1864, section 4; and Act 45 of 1882.

The question of law having been argued, the Court held that the farmers whose votes had been called in question were resident householders, and were entitled to vote, and that the Magistrate was right in recording their votes. The questions of fact were then considered, and at the conclusion of the argument the Court delivered judgment.

The Chief Justice said the real objection taken at the election was that certain farmers who owned houses in the village of Middelburg were allowed to vote although they did not permanently reside in those houses. The Court had already disposed of that objection. After the election had been completed—in fact, after the second election had taken place—it was discovered by the applicant that there was a further objection, which was coupled with that raised in the original notice of motion. Now in his (the Chief Justice's) opinion it was too late, after what had occurred, for the applicant to raise fresh objections. It was clear that at the election a mode of scrutiny was agreed upon by all parties. The affidavit of the Magistrate might fairly be taken as stating what actually took place. [His Lordship read the Magistrate's affidavit given above.] Now if these statements were correct, it was clear that the applicant could no longer insist upon his scrutiny, and in his (the Chief Justice's) opinion it was now too late to disturb the fresh election. The applicant had an opportunity of being a candidate in the second election, but he had chosen to stand or fall on the question whether these farmers had a right to vote or not. By that question he must now stand or fall. The application must be disallowed with costs.

REGINA V. MATTHYS ARNOLDUS.

Forest Act — 28 of 1888 — Government Notice No. 504 of 1889—Regulation 13—Alleged contravention—Conviction—Appeal—Conviction quashed.

Mr. Searle appeared for the appellant, and Mr. Giddy for the Crown.

This was an appeal from a sentence of the Resident Magistrate of Namaqualand, passed upon the appellant for his alleged contravention of regulation 13 under Government Notice No. 504 of 1889,

published under the Forest Act 28 of 1888, "in that between the 8th and 19th days of March, 1892, and at (or near) Crown lands, in the neighbourhood of Henkries, the same being on undemarcated forest in the said district, the said Arnoldus did wrongfully and unlawfully cut or remove certain poles or wattles from such undemarcated forest as aforesaid, without having the licence or permit as in that behalf by law required."

The appellant was found guilty, and sentenced to pay a fine of ten shillings, or undergo three days' imprisonment with hard labour.

From this decision the appellant now appealed, the grounds of appeal being as follows:

1. That the poles were cut at a spot covered by the ticket of occupation, issued to the Steinkopf Community, and of which the accused is a member.
2. That for a period of thirty-three years and upwards the said Steinkopf Community have exercised the right of chopping wood on the banks of the Orange River in the neighbourhood of the spot now in question, as the evidence discloses.
3. That the conviction is not supported by the evidence.

The accused in his evidence stated that he had chopped the poles on the Steinkopf Institution ground, that he was a member of that institution, that it was usual to chop poles there, and that he had done so since he had had understanding; that all the Steinkopf people had done so, and that he considered that he had a right to chop poles there.

Reference was made in argument to the "Report of the Select Committee of the Legislative Council on the Lands in Namaqualand set apart for the Occupation of Natives and Others" (29th June, 1888).

From this report it appeared that the natives of the Steinkopf Institution were in occupation of about 60,000 morgen of land, and that they had been in occupation of the land before the extension of the Colonial boundary to the Orange River in 1847, and that it was at one time suggested to give them title on their paying for survey, but it was found that a survey would cost about £1,000, which they could not afford, so the matter dropped.

Mr. Searle, for the appellant, contended that the evidence was wholly insufficient to convict, as there was really no evidence as to where the poles had been cut, or whether the ground on which they had been cut was an undemarcated forest within Act 28 of 1888, section 2 (M).

Mr. Justice Upington, on the question of onus, referred to the 86th section.

Mr. Searle submitted that the evidence went to show that the timber in question belonged to the Steinkopf Institution, and that the appellant, as a member of that institution, had a right to cut it. The Magistrate was also wrong in confiscating the poles, as there had been nothing fraudulent in the appellant's conduct.

Mr. Giddy was heard on behalf of the Crown.

The Chief Justice, in giving judgment, said that although the immediate question which the Magistrate had to decide appeared to be a simple one, really the question he had to determine before there could be a conviction was one of the greatest importance, as it involved the question of the right to the whole of the vast extent of territory shown on the plan, and also whether the natives who occupied this territory before it became Colonial territory had a right to cut the wood upon it. It appeared the Magistrate had dealt with the case in the most trivial manner, the evidence being of a very meagre description. Many more particulars should have been obtained in evidence before the case was decided. The only proof there was as to property was really the evidence of the accused, who stated that the property was really that of the Steinkopf Institution, and that, from the earliest period he could remember, natives had cut wood there. That question must be left for a test case, in which all evidence possible should be brought. If the Court now decided to sustain the conviction, they would be deciding that these people had no right to cut wood on the land; on the other hand, by quashing the conviction, they would only leave the real question in the case to be decided hereafter. In view of the great importance of the question, the Court thought the present conviction ought to be quashed, leaving the parties to settle the further question by action.

The appeal was accordingly allowed, and the conviction quashed.

[Appellant's Attorneys, Messrs. van Zyl & Buissinne].

In re PETITION OF WM. PEARSON.

Mr. Giddy moved for authority to the Registrar of Deeds to cancel certain mortgage bond, originally for £500, passed by the Theatre Committee of Port Elizabeth in favour of the South African Irrigation and Investment Company in 1868, the said bond having been paid, but since lost or destroyed.

A rule *nisi* was granted, calling upon all persons interested to show cause why the order should not be granted.

SUPREME COURT.

(IN CHAMBERS).

[Before Sir J. H. DE VILLIERS, { 26th April,
K.C.M.G. (Chief Justice) and Mr. { 1892.
Justice BUCHANAN.]

In re REINERS VON LAER AND CO. V. FEHR.

Privy Council—Appeal—Question of right amounting to £500—Charter of Justice, Sections 50 and 51—Security for costs.

Mr. Schreiner, Q.C., appeared for the applicant, and Mr. Searle for the respondents.

Mr. Schreiner, on behalf of the original respondent (Fehr), applied for leave to appeal to Her Majesty in her Privy Council from the judgment pronounced by the Supreme Court, in favour of the original applicants, on the 12th of the present month.

Mr. Searle remarked that he was not instructed to oppose the present application if their lordships considered that a question of right was involved, amounting to £500. In any case the respondents were entitled to have their trade-mark registered.

The Chief Justice: In our judgment we did not think any damage would be done.

Counsel referred to the 50th and 51st sections of the Charter of Justice, and to the case of the "Cape Divisional Council v. De Villiers" (Buch. 1875, p. 125), with regard to appeal to the Privy Council on a question of right.

Mr. Schreiner, on the subject of allowing the respondents to register their trade-mark, observed that in the event of the applicant succeeding in his appeal further litigation might be found necessary to compel the respondents to state an account as to the interim profits which they had gained, and it would be difficult to fix the security which they should give.

The Court granted the application, but only on the grounds that the respondents had not denied the specific allegation made in the applicant's affidavit, namely, that a question of right was involved amounting to over £500 in value. The judgment appealed against would be carried out in its entirety. The usual security to be given by both parties, in terms of the 50th section of the Charter of Justice.

BROWN AND CO. V. DICKS.

Mr. Sheil moved for an order restraining the respondent from alienating or otherwise disposing of a certain piece of land known as the "Caves" in the district of Barkly East, and for leave to ap-

plicants to sue by edictal citation in an action about to be brought against the respondent for the recovery of £687 14s. 9d., balance due for cash advanced, and in respect of certain promissory notes.

The Court granted leave to attach the property *ad fundandam jurisdictionem*, and to sue by edictal citation returnable 14th June. The intendit to be served with the citation. Failing personal service, a further application to be made for direction as to publication.

IN RE THE MINORS BOURHILL.

Minors—Petitions affecting their interests—Presentation to Master—Practice.

Petitions in which minors are interested should be submitted to the Master for his report before they are presented to the Court.

Mr. Tredgold moved for leave to the tutors to sell a certain lot of ground, marked No. 5 in the village of Fraserburg, registered in the names of the said minors, a satisfactory offer for the same having been made, while no adequate bid was obtained when the land was offered to public competition.

The Court granted the order, the proceeds of the sale to be paid into the Guardians' Fund to the credit of the minors.

The Chief Justice remarked that he thought it well that it should be publicly known that the proper course to pursue, where a petition is presented to the Court in which minors are interested, is that the Master should have an opportunity of seeing the petition before it is presented, and of making his indorsement upon it, as he had done in the present case. That practice would save the costs of a subsequent reference, and he (the Chief Justice) trusted that in future it would be understood that attorneys, in presenting petitions to the Court in which the interests of minors were concerned, should give the Master an opportunity of making his remarks upon the petition before it was presented to the Court. A similar practice had been adopted in the Deeds Office, and had been found to work well.

IN RE THE PETITION OF GEORGINA S. K. JAMES.

Mr. Moltenb moved for authority to petitioner to receive the amount of an inheritance arising out of the estate of her late grandmother without the intervention of petitioner's husband, and for leave to sue her said husband by edictal citation in an action about to be brought by her for restitution of conjugal rights, failing which for divorce.

The Court granted a rule *nisi*, returnable 9th June, calling upon the husband to shew cause why the money in question should not be paid to petitioner, the rule to operate as an interdict. Leave was also given to sue by edictal citation, the interdict to be served with the citation.

BEGINA V. JACOB LOTTERING.

Mr. Joubert appeared for the accused, and Mr. Giddy for the Crown. This matter was ordered to stand over until the first day of next term for argument before the full Bench.

SUPREME COURT.

(IN CHAMBERS.)

[Before Mr. Justice BUCHANAN
and Mr. Justice UPINGTON, } 8rd May, 1892.
K.C.M.G.]

In re VAN ZYL.

On the motion of Mr. Searle, Mr. Johannes Petrus van Zyl was admitted as an attorney and notary public. The oaths to be taken before the Resident Magistrate of Burgersdorp.

In re MULLER.

On the motion of Mr. Searle, Mr. Anthony Muller was admitted as an advocate. The oaths to be taken before the Registrar of the High Court.

In re THE ESTATE OF THE LATE JANTJE UMHLEBI.

Mr. Tredgold moved for an order authorising the Registrar of Deeds to transfer to Zacharia Umhlebi, eldest son and universal heir under the native law of the Tembu tribe, the landed property in the estate, consisting of a farm in the Tambookie location, in the district of Queen's Town.

The Court ordered the matter to stand over, Mr. Justice Buchanan suggesting that all parties interested should appear before the Resident Magistrate, who should make a declaration as to the law on the subject of native succession, and report thereon to the Supreme Court.

In re THE PETITION OF MARIA D. VAN RENSBURG.

Mr. Sheil moved for an order authorising the Registrar of Deeds to act on a power of attorney executed by petitioner without the assistance of her husband, to whom she is married out of community of property (the marital power not being excluded in the ante-nuptial contract), who is at present absent from the Colony and whose address is unknown, in respect of the transfer to the legatee of a certain farm called Rietvallei, in the district of Uniondale, bequeathed by the will of petitioner and her late husband to their son, David H. Nortje.

The Court granted the Registrar of Deeds the authority asked for.

In re THE ESTATE OF THE LATE GEORGE PIGOT MOODIE.

Mr. Graham applied for the appointment of a *curator ad litem* to represent the minor children of the deceased in proceedings about to be instituted to ascertain the true construction of the will of the testator.

The Court appointed the Attorney-General *curator ad litem*.

In re THE ESTATE OF THE LATE JEAN P. TIRAN.

Mr. Searle moved for authority to the executors to sell certain house and erf situated in the village of Oudtshoorn, and specially bequeathed by deceased as a place of residence for his children, the proceeds to be divided amongst the said children.

The Court, on the suggestion of counsel, ordered the matter to stand over for the Master's report.

Postea (May 10.)

Counsel informed the Court that the matter had been referred to the Master, who was of opinion that a question as to the construction of the will was involved, so that the matter was now left for the decision of the Court.

The Court held that it was the intention of the testator that the properties in question should be kept until the minors had reached majority, and refused the application.

SUPREME COURT.

(IN CHAMBERS.)

[Before Mr. Justice BUCHANAN
and Mr. Justice UPINGTON, { 10th May, 1892.
K.C.M.G.]

In re ELFFERS.

On the motion of Mr. Webber, Mr. Hubertus Elffers was admitted as a translator in the English and Dutch languages.

In re THE PETITION OF BARRENA.

Mr. McLauchlan, on behalf of the petitioner, moved for leave to sue by edictal citation *in forma pauperis*, in an action against her husband for restitution of conjugal right, failing which for divorce.

The matter was referred to counsel for his certificate.

In re THE ESTATE OF MOODIE.

Mr. Searle moved for the appointment of a *curator ad litem* to represent the minor children of the late Duncan C. F. Moodie in proceedings about to be instituted in the Supreme Court with reference to the will of the late George Pigot Moodie.

The Court granted the application, and appointed Mr. Juta *curator ad litem*.

SADIK V. TALIEB.

Mr. Juta appeared for the applicant; the respondent appeared in person.

Mr. Juta moved for an order restraining the respondent from performing the duties of imaum or priest of the congregation of the mosque at the corner of Long and Dorp-streets, Cape Town.

It appeared from the affidavits that the respondent was appointed to act as imaum by the trustees and congregation of the mosque during the illness of the applicant, but after the recovery of the latter he refused to give up the key of the mosque or to discontinue his ministrations.

The respondent informed the Court that he was willing to give up possession of the mosque if his salary, amounting to £40, was paid.

The Court granted an interdict restraining the respondent from interfering with the applicant in the discharge of his duties as imaum.

Mr. Justice Buchanan, addressing the respondent, told him that he would have to give up possession of the mosque; but that if he had any claim against the trustees, and had not sufficient

funds to enable him to institute an action, the Court on his petition would allow him to sue *in forma pauperis*.

LEIBBRANDT V. SEID RASHEE.

Costs — Security — *Incola* — Description in summons — Promissory Note — Action in Magistrate's Court — Removal to Supreme Court under Act 21 of 1876, Section 3, as amended by Act 43 of 1885, Section 6.

Application to compel a plaintiff to give security for costs refused, on the grounds that although the plaintiff had, in his summons, described himself as being of Bagdad, there was proof aliunde that he was domiciled in the Colony.

Mr. Searle appeared for the applicant, and Mr. Graham for the respondent.

Mr. Searle moved for an order requiring the respondent to give sufficient security for the costs which might be incurred by applicant in defending an action instituted by the respondent, whose domicile, applicant alleged, was out of the Colony.

It appeared from the affidavit of Mr. Attorney Brink that the applicant had been summoned by the respondent for payment of £50, alleged to be due on a promissory note made by the applicant in favour of the respondent.

That the respondent was not an inhabitant of the Colony, and that it was his intention to leave the country as soon as he had settled his affairs.

That in the summons served on applicant the respondent had described himself as being of Bagdad.

That applicant had had no security for such costs as might be incurred by him in defending the said action.

That applicant had a good and substantial defence to the said action.

The respondent in his answering affidavit alleged that he was at present residing in Cape Town, and had been residing here for over four years; that he had married here, and that his wife was Cape born.

That it was untrue that he intended to leave the Colony as soon as he had settled his affairs. That at present he was carrying on the business of an Indian merchant here; that he had stock on hand and outstanding debts amounting to £400.

That the action was brought by him in the Resident Magistrate's Court, Cape Town, but that the defendant (present applicant) applied to the Magistrate to have the case tried in the Supreme Court, under the provisions of Act 21 of 1876, section 3, as amended by Act 43 of 1885, section 6,

and that he (respondent) was now willing to have the case decided by the Resident Magistrate.

Mr. Searle, in support of the application, referred to the evidence given by the respondent in the case of "*Resid v. Abader*" (1 O.T.L.R., 327), and contended that on the respondent's own showing he was not an *incola*, and was consequently bound to give security. The applicant had a good defence to the action, inasmuch as he alleged that he had never signed the promissory note in question, and that his pretended signature was a forgery.

The Court, without calling upon Mr. Graham, refused the application, holding that although the respondent had described himself in the summons as being of Bagdad, still there was proof *aliunde* that the respondent was domiciled in the Colony. The question of costs was ordered to stand over.

In re THE ESTATE OF THE LATE MARY ANN ATTWELL.

Executor testamentary and trustee—Absence from the Colony—Refusal to appoint agent to transfer property in trust estate—Removal from office—Rule *nisi*.

Mr. Schreiner, Q.C., moved for an order authorising the Registrar of Deeds to pass transfer to members of the firm of Attwell & Co. of certain landed property in the above mentioned estate, and also to convey to the purchaser of certain land bequeathed to the late Edwin E. Whiley on the authority of two of the executors, the third being in England and not willing to act except on unreasonable terms.

It appeared from the joint affidavit of James William Attwell and Charles Hugh Attwell that they, and one William Torbet, are the executors testamentary in the estate of the late Mary Ann Attwell.

That on the 18th May, 1877, certain land situate in Cape Town, known as the Twist Nist and other property, was transferred to the then firm of Attwell & Co., of which firm the said late Mary Ann Attwell was a partner.

That the estate of the late Mary Ann Attwell had been liquidated, and at the time of the liquidation thereof her estate's share in the said property was taken over by the remaining partners in the firm of Attwell & Co., which said firm is now dissolved, and the property above referred to taken over by Charles Hugh Attwell, Ann Debora Wells, and James W. Attwell.

That transfer of the share of the late Mary Ann Attwell of the said property had not been passed to the firm of Attwell & Co., nor had conveyance

been made to the said Charles Hugh Attwell, Ann Debora Wells, and James William Attwell.

That in order to enable transfer to be effected from the estate of the said late Mary Ann Attwell it was necessary that all the said executors, or their duly-authorized agent or agents, should be parties to the documents of conveyance, unless the Court should otherwise order.

That one of the executors aforesaid, namely, William Torbet, was absent from this colony, and could not therefore act in person in the conveyance of the said property.

That the petitioners had communicated with the said Torbet, and had requested him to empower some person to act for him in the matter of the conveyance aforesaid, and had duly forwarded for his signature in England (where he is now residing) the documents necessary to empower an attorney or agent to act for him in the said matter.

That the said Torbet had refused to empower anyone to act for him, but had requested his co-executors to pay him £50 to enable him to travel from England to this colony for the purpose, *inter alia*, of investigating the matters connected with this transfer.

That the actual presence of the said Torbet was not necessary herein, and that the expense of an outlay of £50, as sought by him, was unwarrantable, and was one which the estate was not in a position to pay, as the same had been closed for some years, and had not now funds available.

That petitioners and the said Torbet, under the will of the said late Mary Ann Attwell, were also appointed the trustees of certain property to be purchased for one Edwin Ellard Whiley, a legatee under the said will.

That the petitioners duly purchased such property, and received conveyance thereof in their capacity as trustees in conjunction with the said William Torbet.

That the said Edwin Ellard Whiley was now deceased, and his son and executor (James Lucas Whiley) now desired to sell the landed property in the estate of his late father vested as aforesaid.

That to enable valid transfer to be effected after sale, the signature of the said William Torbet was required to the documents of conveyance, or else some person required to be deputed to act for him.

That petitioners had requested Torbet to appoint some person to act in his stead, but that he had neglected and refused so to do, unless he received the sum of £50 wherewith to pay for the expense of journeying to this colony to enable him to act in person herein, which said expense was unnecessary, and one which the said Torbet was not entitled to ask for nor the petitioners to make.

Wherefore the petitioners prayed that the Court might be pleased to authorise the Registrar of

Deeds to pass valid transfer to the members of the firm of Attwell & Co. of the aforesaid property from the said estate of the late Mary Ann Attwell, and also to convey to the purchaser, from the estate of the late Edwin Ellard Whiley, the property at present vested in the petitioners and the said William Torbet, without the aid of the latter in the conveyance of the said properties, or for such other relief as to the Court should seem meet.

Mr. Schreiner, under the peculiar circumstances of the case, asked for a special order, and pointed out that Torbet's demand for £50 was a mere attempt on his part to levy blackmail. Mary Ann Attwell's estate had been liquidated years ago, and there were no further funds in that estate. The remaining acts to be performed by the executors were merely formal.

The Court granted a rule nisi calling upon Torbet to show cause on the 12th July why he should not be removed from his office as executor and trustee, and the applicants authorised to proceed with the liquidation of the estates, and why he should not pay the costs of the present proceedings.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G., (Chief Justice), Mr Justice BUCHANAN, and Mr Justice UPINGTON, K.C.M.G.] { 16th May, 1892.

IN RE STOCKENSTROOM.

On the application of Mr. Schreiner, Q.C., Mr. Andries Stockenstroom was admitted to practise as an advocate.

PROVISIONAL ROLL.

DUTCH REFORMED CHURCH, MIDDELBURG, V. DU FREEZ.

On the motion of Mr. Sheil, provisional sentence on a mortgage bond for £100, with interest from the 31st May, 1886, was granted.

WILLIS V. VAN BLERK.

On the motion of Mr. Sheil, provisional sentence on a mortgage bond for £200, with interest from the 8th June, 1890, was granted, and the property declared executable.

BACHMAN V. SCHUNKE.

On the motion of Mr. Molteno, a writ of civil imprisonment for £57, upon an unsatisfied judgment, with interest from the 4th January, together with £11 7s. 6d. being taxed costs, also the sum of £4 14s. 4d. for taxed costs of the writ, was ordered.

BALL AND BROWN V. SCHUNKE.

On the motion of Mr. Molteno, a writ of civil imprisonment was granted for £84 6s., upon a judgment, with interest £6 16s. 6d., and costs of writ £4 14s. 4d.

JOUBERT V. THOMSON.

Mr. Juta moved for a writ of civil imprisonment on an unsatisfied judgment (less certain payments) of £146.

Mr. Maskew appeared for the respondent, and explained the inability of his client to pay more than 10s. per month. He was in his father's office, and received £5 per month.

In his affidavit the respondent stated that if he did not receive the mercy of the Court it would be his lot to go to gael or become an exile.

The order was granted; the writ to be suspended during the payment by the defendant of £2 per month.

SAVINGS BANK SOCIETY V. BOTMA.

On the motion of Mr. Graham, the final adjudication of defendant's estate was decreed.

BATTENHAUSEN V. VENTER.

On the motion of Mr. Webber, provisional sentence on a promissory note for £191 5s. was granted.

LITHMAN AND ANOTHER V. JOHN DUNN.

On the motion of Mr. Graham, provisional sequestration of defendant's estate was decreed.

MAHOMET RASHEE V. J. D. LEIBBRANDT.

Mr. Graham moved for provisional sentence on a promissory note for £50.

The Court appointed next Wednesday for the hearing of witnesses.

RASHEE V. ABARDER.

This was a similar case to the above, and the same date was fixed for hearing of witnesses.

VAN STAVEREN V. BAIN.

On the motion of Mr. McLachlan, provisional sentence for £9, rent, was granted.

SCOTT V. R. M. FARRANT.

On the motion of Mr. Graham, provisional sentence for £9, rent, was granted.

REHABILITATIONS.

On motions from the Bar, the rehabilitation of the following insolvents was granted: David Henry Pritchard, George Nelson Pell, Edward Norton, sen., James Flower, James and Edith Wall, and Dirk Bernhardus Jansen.

GENERAL MOTIONS.

PETITION OF HENDRIK J. LANDMAN.

Mr. Searle moved to make absolute the rule *nisi* for the amendment of a certain deed of transfer passed on the 17th August, 1874, in favour of the petitioner and others, conveying to them erroneous shares in the farm De Smeuw, in the district of Aberdeen.

The Court made the rule absolute.

PETITION OF HENDRIK C. DU PLESSIS AND OTHERS.

Mr. Searle moved for an order authorising the Registrar of Deeds to register in their names a certain one-sixth share in a piece of perpetual quit-rent lands, part of the farms Komskloof and Wolvekloof, in the district of Graaff-Reinet, such share having been acquired by petitioners, but an erroneous extent transferred to them.

The Court granted a rule *nisi* under the 7th section of Act 28 of 1881, calling upon all persons claiming to have any right or title to the property to appear on the 12th July and establish their claims, the rule to be advertised in the *Government Gazette* once, and to be served on the executors of J. J. du Plessis, who were to be appointed.

BARRENA V. BARRENA.

On the motion of Mr. McLachlan, the Court granted a rule *nisi* requiring petitioner's husband to show cause why she should not be admitted to sue *in forma pauperis* by edictal citation, in an action for the restitution of conjugal rights, failing which for divorce, and the custody of the minor child of the marriage.

IN RE THE PAARL BANK.

Mr. Schreiner moved for an order in terms of the second report of the official liquidators to make absolute the rule *nisi* for a further call of £500 on each share, payable by contributories at once, and asked the Court to fix the remuneration for the first year's services of the three liquidators. The amount of money that passed through the hands of the liquidators was £74,771, and Mr. Schreiner suggested that the liquidators should be awarded £800 per annum each.

The Chief Justice suggested that it might meet the case if the Court granted an award of £2,400 to the liquidators up to the date of the report.

Mr. Schreiner pointed out that this liquidation was more difficult than one where the creditors were able to pay the calls.

The Court granted the order, and a remuneration of £800 to each of the liquidators, the Chief Justice remarking that in future years the remuneration would have to be considerably reduced.

PETITION OF HENRY WILLIAM PEARSON.

On the motion of Mr. Webber, the Court made absolute the rule *nisi* for the cancellation of a certain mortgage bond for £500 passed on the 27th June, 1868, by the Theatre Committee of Port Elizabeth in favour of the South African Irrigation and Investment Company.

IN RE THE KAFFRARIAN STEAM, LANDING, AND SHIPPING COMPANY AND THE EAST LONDON LANDING AND SHIPPING COMPANY.

On the motion of Mr. Graham, the Court granted an order placing the said companies under the operation of the Winding-up Act of 1868, and appointing as official liquidators with the necessary powers. Messrs. Carroll and Green, of the first named Company, and Messrs. Fuller and Gately, of the second.

TREMEEER V. TREMEEER.

Mr. Sheil moved to make absolute the rule *nisi* granted at the Circuit Court held at Fort Beaufort on the 18th March last, for the dissolution of the marriage subsisting between the parties by reason of the defendant's failure to comply with the order of Court for the restitution of conjugal rights.

The Court made absolute the rule *nisi* dissolving the marriage with costs.

In re PETITION OF THE PORT ELIZABETH TOWN COUNCIL.

On the motion of Mr. Sheil, the Court made absolute the rule nisi for the attachment and sale of certain derelict lands situated in Port Elizabeth, on which Municipal rates have been due for upwards of five years; and ordered the schedules to be amended by inserting the name Magdalena Johanna Gardner (born Onsthuysen) in place of Gerhardus Onsthuysen, in whose name the properties in question had been advertised as registered.

IN RE THE MINOR DE GREEF.

Mr. Maskew moved for leave to the father of the minor to raise a loan on mortgage on a certain piece of land at Malmesbury, the property of his son, for the purpose of completing a dwelling-house thereon.

The Court granted the order in accordance with the recommendations of the Master's report, that the father bind himself as security.

IN RE THE MINOR LILY ELLEN CULLIS.

On the motion of Mr. Sheil, the Court granted authority to the Master to pay to the said minor, out of her maternal inheritance, a quarterly allowance, for the purpose of defraying the cost of her education as a pupil teacher until she shall attain her majority.

IN RE THE MINOR JAMES LEWIS BOURKE.

On the motion of Mr. Sheil, the Court granted an order authorising the Registrar of Deeds to pass a mortgage bond on security of the balance of the purchase price of the farm Mol's Vley, in the district of Namaqualand, purchased on behalf of and for the benefit of the said minor.

TADMAN V. TADMAN.

On the motion of Mr. Schreiner, Q.C., the return day in this case was extended to the 12th July.

DIPPENAAR V. DIPPENAAR.

On the motion of Mr. McLachlan, the return day in this matter was extended to the 12th July.

IN RE REGINA V. ADAM.

Liquor licence—Act 28 of 1883, Section 75—
Contravention—Conviction—Confiscation
under Section 88—Appeal.

Mr. Searle appeared for the appellant, and Mr. Giddy for the Crown.

This was an appeal from a judgment of the Eastern Districts Court upholding a decision of

the Resident Magistrate of Graham's Town. The appellant was indicted for, and found guilty of, contravening section 75, Act 28 of 1883, in that he had unlawfully sold certain intoxicating liquor without having a licence to do so. The appellant was fined £12 10s., or a month's imprisonment, and the liquor found on the premises was confiscated under section 88 of the Act. It appeared from the evidence that a renewal of the licence for the premises had been refused some months before, but a large quantity of liquor still remained in stock. The licence had been granted to appellant's brother, Peter Adam (since dead), and it was alleged that the liquor found on the premises belonged to the latter, and was retained pending another application to the Licensing Board for a renewal. The appellant meantime carried on an aerated water business on the premises, and on the day alleged in the charge was proved to have sold brandy (which witnesses proved was purchased for appellant's private use at a neighbouring hotel), to a native trap. The grounds of the appeal were that the liquor and vessels seized by the police and confiscated did not belong to the appellant, but were the property of his late brother, Peter Adam, and belonged to the latter's estate, and consequently ought not to have been confiscated; further, that they were not on the premises for the purpose of sale. The Eastern Districts Court upheld the decision of the Magistrate, and from that judgment the present appeal was brought.

Mr. Searle contended that the conviction was wrong and further that, under the 88th section, there could be no confiscation of liquor which did not belong to the person who had sold it.

The Chief Justice, in giving judgment, said it was seriously denied that an illicit transaction had taken place, it was the accused who sold the brandy to the trap, but it was contended now that the Magistrate was wrong in confiscating the liquor, inasmuch as that liquor belonged not to the accused, but to Peter Adam. His lordship referred to sections 77 and 78, and observed that there was sufficient evidence to justify the Magistrate in taking it that the liquor was kept on the premises for an unlawful purpose. Under these circumstances the appeal would be dismissed.

Their lordships concurred.

[Appellant's Attorney, G. Montgomery-Walker.]

IN RE REGINA V. PEARSON.

Liquor licence—Act 28 of 1883, Section 73,
Sub-section 7—Alleged contravention—
Conviction—Evidence as to time—Appeal.

Mr. Molteno appeared for the appellant and Mr. Giddy for the Crown.

This was an appeal from the conviction of the appellant by the Resident Magistrate of Prieska on a charge of contravening section 78, sub-section 7, Act 28 of 1888, in that on or about the 9th April, 1892, the appellant exposed liquor for sale at a time when he was not by his licence authorised to sell liquor, viz., at 7.20 p.m. The appellant was found guilty and fined £2, or a month and one day's imprisonment.

Mr. Van Bart, Distributor of Stamps at Prieska, the chief witness for the Crown, stated in his evidence that he could not say what the proper time was at Prieska, as it did not seem that there was any proper time in that town. It appeared from the evidence of other witnesses that the clock in the Magistrate's office was very erratic in its movements, and that it was doubtful whether the alleged offence took place before or after seven p.m.

Mr. Molteno was heard in support of the appeal, and referred to the very loose way in which time was regulated in Prieska. He submitted that the Magistrate should have had clearer evidence before him to justify a conviction which might have such a prejudicial effect on the appellant if upheld.

Mr. Giddy argued that it was a question of fact, and the Magistrate was as able to judge as anyone. Section 77 threw the whole onus of proof upon the party charged.

The Chief Justice, in giving judgment, said the question was, what was the inference from the facts proved, and such inference this Court was in the position of drawing just as well as the Magistrate. The very first witness called upon on behalf of the prosecution said, in cross-examination, "I cannot say what the proper time is at Prieska; it does not seem as if we have proper time." And it was that evidence upon which the conviction was made. After that admission he did not think that because the clock showed 7.20 that that was the time, as the evidence showed that it was very irregular in its movements. It seemed to him that it was just as likely that it was before seven o'clock as after it, and there should not have been a conviction unless the time was proved by some clock that could be depended upon. Under these circumstances, his lordship thought the appeal should be allowed, and the Magistrate's judgment quashed.

[Appellant's Attorney, G. Montgomery-Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 17th May,
Justice BUCHANAN, and Mr. 1892.
Justice UPINGTON, K.C.M.G.]

RICHARDS V. RICHARDS.

On the motion of Mr. Tredgold, the Court granted a further extension till 12th July of the rule calling upon the defendant to return to his wife. The publication was to have been made in America, but the papers have not yet arrived.

IN THE ESTATE OF OLIVIER.

On the motion of Mr. Searle, the notice of motion for a decree of ejectment was allowed to stand over till Thursday, 19th instant.

MDLELENI V. MONGEZELELI.

Review—190th Rule of Court—Chief Magistrate of Tembuland—Action for work and labour performed—Midwife—Appeal from Resident Magistrate's decision—Notice—Irregularity—Review of proceedings in Chief Magistrate's Court.

Mr. Molteno appeared for the applicant, and Mr. Giddy on behalf of the Chief Magistrate of Tembuland.

This was an application for review by summons of a decision of the Chief Magistrate of Tembuland. The applicant's wife, who was a sister of the respondent, had been delivered of a child, and the respondent's wife assisted at the said delivery. Twelve months after this event, the respondent sent in a claim for the delivery of a cow, or the value thereof, £4, for services rendered by his wife.

The case was heard before the Resident Magistrate of Cala, Tembuland, who dismissed the same with costs. Thereafter the plaintiff, without giving the defendant notice, appealed to the Chief Magistrate of Tembuland, who allowed the appeal and gave judgment for the appellant (original plaintiff) for 80s. and costs.

The Chief Magistrate delivered the following judgment:

The grounds for dismissing this case, that a relationship subsisted between plaintiff and defendant, is bad in law. Although it may be customary for relations to assist each other, when a claim is made for work and labour done the relationship does not bar such claim. The demand, however,

for one beast is vague, as the beast may be of any value. Judgment will be given for plaintiff for £1 10s. and costs.

The grounds upon which the review was asked were:

(a) That notice of appeal from the Resident Magistrate's judgment had not been given.

(b) That the proceedings before the Chief Magistrate were wholly irregular and contrary to law.

Mr. Molteno was heard in support of the review, and submitted that the case should be remitted to the Chief Magistrate, to be decided on the merits, notice in the meantime to be given to the original defendant.

The Chief Justice, in giving judgment, said the only question to be determined was whether the Chief Magistrates' decision should be set aside on the ground of irregularity. It was not denied that no notice had been given to the respondent in the Chief Magistrates' Court. No judgment should be given without notice, and that alone was sufficient ground for setting aside the judgment of the Chief Magistrate. The Court could not decide this case as if it were an appeal, but he (the Chief Justice) thought they ought to express an opinion that the Magistrate in the original case was perfectly right. There was no evidence that this woman went to assist as a midwife, she went merely as a friend, and was consequently not entitled to claim any remuneration. This was, however, only an opinion, but his lordship said he had no doubt that it would have some weight with the Chief Magistrate. The proceedings must therefore be set aside, with costs.

[Applicant's Attorneys, Findlay & Tait.]

IN RE REGINA V. JACOB LOTTERING.

Perjury—Sworn affidavit—Oath material to question pending—Judicial proceedings—Indictment—Conviction—Point reserved.

Mr. Joubert appeared for the prisoner, and Mr. Giddy for the Crown.

This case came on for argument on a point reserved at the last Circuit Court held at Beaufort West, on the conviction of the accused on a charge of perjury in making a false affidavit alleging murder against two farmers.

The accused had spread a report that he had seen two farmers, Mr. Albert Smith and Mr. Jacob Smith, shoot an old man named Ismael Abrahams, *alias* On Smelt, a herd residing at Witdam, in the district of Fraserburg.

This statement the prisoner incorporated in an affidavit sworn before the Resident Magistrate of Fraserburg.

The report was subsequently found to be a pure fabrication, and the prisoner was indicted

for perjury at the last Circuit Court held at Beaufort West, was found guilty, and sentenced to six months' imprisonment with hard labour.

The learned judge who presided at the Circuit reserved the point as to whether the proceeding in which the oath above referred to was taken was a judicial proceeding.

Mr. Joubert, on behalf of the accused, contended that the oath was not taken in a judicial proceeding, and that the indictment was bad, inasmuch as it did not appear from it that the oath was relevant to the question pending. Counsel referred to the following authorities in argument: "*Regina v. Nodola*," 2, E.D.C., 892; "*Regina v. Adendorf*," 3, E.D.C., 408; "*Regina v. Anderson*," 4, E.D.C., 16; "*Regina v. Van Heerden*," H.C. (not reported); Arohibold, pp. 925-932; Russell on Crimes, vol. iii., pp. 2 *et seq.*; Alewn, 470, 71, 72; "*Regina v. Pearson*," 8, C. and P., 119; "*Overton v. Regina*," 4, Q.B., 88.

The Chief Justice, in giving judgment, said the indictment was a perfectly good one, and the allegation of materiality was quite sufficient. It was quite clear from the indictment as it stood that the inquiry which was being made was an inquiry as to whether two men against whom the prisoner made his false statement had unlawfully killed another man. If the statement made by the prisoner, to the effect that these men had unlawfully killed another, would be to the prejudice of the persons against whom it was made, he was guilty of perjury. If there was no intention to prosecute these persons, and the prisoner was led into a trap merely for the purpose of inducing him to make a false statement, his lordship quite agreed that he could not be prosecuted for perjury. The sole object, however, with which the prisoner made the affidavit must have been for the purpose of judicial proceedings. Clearly here the farmers might have been prejudiced if the man alleged to be deceased had not been found, and there is nothing to shew that the Magistrate did not intend to take a preliminary examination against these men. The Court therefore decided against the prisoner.

Mr. Justice Buchanan remarked that he had reserved the point, as it was one of interest to magistrates.

MCCONACHIE'S EXECUTRIX V. BIDEWELL-EDWARDS.

Broker—Agency—Commission—House—Introduction—Subsequent sale—Evidence—Resident Magistrate's decision—Appeal.

Mr. Schreiner, Q.C., appeared for the appellant, and Mr. Juta for the respondent.

This was an appeal from the decision of the Resident Magistrate of Cape Town giving judgment in favour of the respondent for £20, which was a reduced claim in order to bring it within the jurisdiction of the Magistrate's Court. The respondent claimed this sum for commission in respect of his services as house-agent in the sale of a house at Mowbray to Dr. Dixon for £1,200.

It appeared from the evidence of Dr. Dixon that Edwards called upon him in January last and said he would like to show him some houses.

Dr. Dixon and Edwards visited some houses at Green and Sea Points and on a subsequent occasion saw some houses at Rosebank and Rondebosch, and lastly the house in question at Mowbray.

At this visit Edwards introduced Dr. Dixon to Mrs. McConachie.

After examining the house Dr. Dixon told Edwards that he did not like it and *dismissed the idea from his mind as to purchasing.*

Some time afterwards Mrs. Dixon directed her husband's attention to an advertisement offering a house in Mowbray for sale.

Dr. Dixon remarked that he thought it was the house which he had seen with Edwards and said that it would not do.

His wife, however, expressed a wish to see it and together they visited the house and saw Mrs. McConachie.

Mrs. Dixon took a fancy to the house, and her husband asked the price and was told £1,200, the same figure as Edwards had mentioned.

An offer was subsequently made and eventually Dr. Dixon bought the house direct from Mrs. McConachie for £1,200.

The witness further stated in his evidence that he did not think that Edwards influenced him at all in buying the house.

That the action of Mrs. Dixon was the real cause of his purchasing the house, and that the transaction was entirely *de novo*, and that seeing the house advertised and that application was to be made to Mrs. McConachie he thought that Edwards's connection with it was at an end.

The Magistrate's reasons were as follows:

There is little if any conflict of evidence in this case. The broker was employed by Wilman, defendant's agent, to find a purchaser for the house for £1,200 and was promised his commission.

He took Dr. Dixon to the house and they saw defendant who told her servant to show them the house. After leaving the house Dr. Dixon told the broker that the house would not suit.

Within a month afterwards Dr. Dixon's wife saw the advertisement of the house in the newspaper and called his attention to it, and he remarked that it was the same house, which the broker had shown him and that it would not suit. She, however, insisted on seeing it, and the result

was that he bought it for £1,200. The broker hearing of this claimed his commission.

The defence is that the first transaction with the broker had nothing whatever to do with the second visit of the doctor and his wife, and that the house was bought without the broker's intervention.

I have had several cases of this nature, but I could not find any decided case in the Supreme Court on the subject. On referring to the English cases I found that if the broker introduced the parties to each other and if they then entered into negotiations behind his back, which resulted in a sale, he was entitled to his commission.

The question in one of the English cases was just something to this effect.

If the broker had not introduced the buyer, would he have purchased the house? This is a very difficult question to answer. If a house is advertised, it is more than likely that the purchaser could see it even if the broker had not introduced him, and would have gone to see it himself, and there will be nothing to prevent the purchaser assisting the seller to escape paying the commission.

There is always bargaining in the purchase of houses, the purchaser saying at first that the house will not suit, the price is too high, and then after several interviews, coming to terms. In the present case I came to the conclusion that although Dr. Dixon said that the house would not suit him he could not be said to have finally made up his mind not to buy it because the broker says that he told him that he would not buy any house until his wife had seen it. It was therefore part of the arrangement that his wife should see any house he intended to buy.

He should therefore have taken his wife to see the house before giving the broker a decided answer. He appears, however, not to have told his wife of the house until she saw it advertised, and then when he took her to see it she liked it and he bought it.

The introduction of Dr. Dixon to defendant resulted therefore in a sale, the delay being Dr. Dixon's neglect to consult his wife.

Mr. Schreiner, in support of the appeal, contended that there was no connection between the sale of the house and Dr. Dixon's introduction to Mrs. McConachie. Dr. Dixon was under no obligation to Edwards to consult Mrs. Dixon. He made up his mind not to buy the house.

It was clear from the English cases that commission is earned if the sale be effected through the agency of the broker. The chain of causation must, however, be complete. In the present case it was broken by Dr. Dixon's refusal to buy.

Counsel referred to "*Antrobus v. Wickens*," 4 F. and F. 291, and "*Mansell v. Clemens*," L.R. 9, C.P. 189.

Mr. Juta contended that what the Court had to consider was, whether as a fact the man who was brought to the house, and introduced to the owner of the house, eventually bought the house within a lapse of a few weeks for the exact sum of money originally mentioned. He urged that Dr. Dixon, the purchaser of the house, was influenced by the broker, who was therefore entitled to his commission. The general experience of brokers was that on showing a house at first people would not buy, and then, as sometimes happened, the purchase goes through afterwards without the knowledge of the broker, who is therefore deceived, and lost his commission.

Counsel referred to "*Moir v. Watts*," 5 H.C., 119.

The Chief Justice, in giving judgment, said the question which the Magistrate had to determine was this: Was the sale effected through the agency of Edwards? If it was effected through his agency he was entitled to his commission, however small the claim was; if it was not through his agency he was not entitled to any claim, however much pains he might have taken to dispose of the house. Now, the question whether the sale was effected through Mr. Edwards's agency must be decided as an inference from the facts, and this Court was in the same position as the Magistrate to infer from the admitted facts whether the sale was so effected. There was no question here of credibility, and assuming that all the witnesses were to be believed, in his opinion the Magistrate drew the wrong inference from the proof of facts in this case. There appeared to his lordship to have been no relation of cause and effect between the introduction by Edwards and the ultimate sale of the property to Dr. Dixon, and unless there was a relation of cause and effect the sale could not be said to be effected through Edwards's agency. The first introduction led to nothing at all, and the communications had ceased entirely. Dr. Dixon had decided not to buy, and Mr. Edwards had advised that, for the price for which the property was then offered, the sale could not take place. Thereupon Wilman, instructed by Edwards, gave up the sale altogether, and the matter went into the hands of another broker. Then Mrs. McConachie advertised, and Mrs. Dixon saw this advertisement and afterwards induced her husband to buy. Now, how could Mr. Edwards's original introduction be said to have anything to do with this eventual purchase?

The Court therefore allowed the appeal, and decided that the Magistrate's decision should be reversed with costs.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinne; Respondent's Attorneys, Messrs. Findlay & Tait.]

BEKKER V. VAN ZYL.

Contract—Fencing work—Burning and tarring poles—Documentary evidence—Action—Resident Magistrate's decision—Appeal.

Mr. Juta appeared for the appellant, and Mr. Schreiner, Q.C., for the respondent.

This was an appeal from the judgment in favour of the respondent with costs, of the Resident Magistrate of Britstown, in an action in which the appellant (then plaintiff) sued Mr. Van Zyl for the sum of £5 for certain fencing work done at the defendant's request.

The plaintiff, it appeared, had been employed to do 25,000 yards of fencing at £7 10s. per 1,000 yards, and pleaded that the defendant could not take the work out of his hands till it was finished. Disputes arose between the plaintiff and defendant as to burning and tarring the poles, and carrying on the contract in sections. The latter stopped the work, and refused to pay plaintiff unless he gave up the contract. The plaintiff had completed 1,840 yards, and refused to give up the work.

The Magistrate gave the following reasons for his judgment: That the plaintiff left Somerset East with the clear understanding that he would have to sign a contract on arrival at defendant's farm. That plaintiff took on the work knowing at the time that defendant required the poles to be burnt before tarring them, as it was clearly proved 2,700 yards were completed to the satisfaction of the defendant. That the plaintiff then failed to continue the work as he had undertaken to perform it. The defendant had a right to stop the work and defer payment until plaintiff had completed the work as far as the first corner, and that all the poles should have been properly burnt before applying the tar.

(In a letter sent by the defendant (present respondent) to the plaintiff, and which formed the basis of the contract, no mention was made of "burning" poles, but it was stipulated that the poles should be planted two feet deep and tarred 2½ feet.)

Mr. Juta, in support of the appeal, contended that there was nothing in the letter, which was the only agreement, regarding the burning of the poles.

Mr. Schreiner urged that, from the evidence it was clear that there was a verbal agreement that the poles were to be burnt as well as tarred.

The Chief Justice pointed out that plaintiff was not cross-examined on this point.

Mr. Juta said the plaintiff would have continued the work if he had not to burn the poles, and he was willing to do the burning under protest.

The Chief Justice, in giving judgment, said it appeared that the Magistrate in this case did not

attach sufficient weight to the documentary evidence that was put in. When any case of this kind came before this Court in which there was a conflict of evidence, any writing produced that would tend to turn the scale was important, and in the present case the Magistrate seemed to have lost sight entirely of the terms upon which the defendant offered the work to the plaintiff, in that he was asked to do some work in connection with the tarring of the poles, but nothing was said about burning. But then it was said that in point of fact he did burn the poles, and it was often found that people were prepared, on beginning a contract, to do more than they ought to do; but it did not follow that they understood the contract to mean that they were bound to do additional work. And so, when this man found it did not pay him, he determined to take advantage of what he understood to be the contract, namely, that he was only to tar, and not to burn. He (the Chief Justice) did not think there was sufficient evidence to justify the Magistrate in coming to the conclusion that burning was to be done in addition to the tarring. The appeal therefore would be allowed, and judgment entered for the plaintiff for £5 with costs.

[Appellant's Attorneys, Messrs. van Zyl & Buissinne; Respondent's Attorney, G. Montgomery Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, (K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON.) 18th May, 1892.]

RASHEE V. LEIBBRANDT, AND RASHEE V. ABARDER.

Promissory note — Provisional sentence —
Signature—Forgery—Evidence.

Mr. Graham appeared for the plaintiff, and Mr. Searle for the defendants.

On the suggestion of Mr. Graham, the Court agreed to take these two cases together, the defense in each being practically the same.

Mr. Graham said the matter arose out of a motion for provisional sentence on certain two promissory notes, for £50 and £100 respectively, and was postponed from Monday for the examination of witnesses.

The defense set up was that both the notes were forgeries, and the question to be decided was whether the signatures were genuine or not.

Said Mahomet Rashee was the first witness

called, and deposed that Leibbrandt signed the note for £50 in the presence of Abdullah Abarder, Ibrahim, and himself. The promissory note for £100 was signed by Abdoel Hadjie, and Abarder signed it as security. Witness did not know whether Abarder got any consideration for signing the £100 note. Leibbrandt signed the £50 note in consideration of £70 of debts which witness sold to him.

Cross-examined by Mr. Searle, witness stated that the £70 worth of debts was for goods which Abarder sold to different people. These were goods which witness sent from Natal. He came to Cape Town in April, 1891, and Abarder told him all the goods were sold except a small amount. He had not brought the £155 into the reckoning at all for these goods. [Documents proving the style of handwriting of the first defendant, and of his son H. Leibbrandt, were put in.]

At this stage Mr. Graham consulted with the attorneys for plaintiff, and addressing the Court, said that he was informed that several documents had been tampered with since they were put into court in December last in the case of *Resid v. Abarder*. That, being so, he wished to withdraw from the case.

The Chief Justice said this was a most extraordinary case. The letter put in was never written by Leibbrandt. He suggested, however, that the case should go on, so as to hear the other side of the question.

Mr. Graham said he had been instructed to withdraw. The name "Mahomet Abarder" had been added to the documents. The documents were put in at the previous trial, and the name of Mahomet Abarder was not then upon them.

The Chief Justice (to witness): When was that name Mahomet Abarder written on the note? [Produced.] Was it on the day it was signed by Abdoel Hadjie?

Witness: It was on the same day that it was signed, but at a different house.

The Chief Justice (to interpreter): Tell him now that counsel says that the signature was not there.

Witness: I don't know.

The Chief Justice: Was a brief copy made of the note?

Mr. Graham: Yes.

The Chief Justice: It is quite possible that the name might have been omitted in copying.

Mr. Graham agreed to go on with the case.

Osman Adam was called, and stated that he was present when the £50 note was signed by Mr. Leibbrandt.

Cross-examined by Mr. Searle, witness stated that he was standing some distance off when Leibbrandt signed the note. Witness wrote out the list of people who owed the £70. This amount was for goods that came from Natal.

Abdullah Hoosen swore that he saw Leibbrandt sign the £50 note, and also the £100 note, which Abarder also signed.

Cross-examined by Mr. Searle, witness deposed that he was quite sure that Leibbrandt wrote first on the £100 note.

Zameeden and Hadji Zameeden deposed to a receipt being given by Mr. Leibbrandt for goods sold by the plaintiff.

Johan David Leibbrandt, defendant, denied the signatures on the promissory notes. He did not know anything at all about the letter written in March, 1892, alleged to have been written by him about a promissory note for £50. He never had any transactions with Said Rashee, and the signature on the receipt produced was not his.

By Mr. Searle: The people mentioned on the list were the same names as owed money to Abarder, and the money he collected was for Abarder.

Mahomet Abarder, one of the defendants, also denied the signatures on the promissory notes produced. The document he did sign was put in in the previous action. Shewn letters dated January and May, witness denied that the signatures attached thereto were his. This was the first time he saw the letter now produced. The letter supposed to be written by him last week to Osman was not written by witness. He never signed a document bearing Abarder's signature, and had never become security for him.

By Mr. Graham: He knew nothing about the letters that had been put into court now.

The Chief Justice, in giving judgment, said that whatever else might be doubtful in this case one thing was clear, that gross fraud had been perpetrated on one side or the other. If the defendants really signed these two notes, then they were guilty of false swearing now; and, on the other hand, if the notes were not genuine the plaintiff was guilty not only of forging these two notes in question, but guilty of forging a series of documents for the purpose of prepping up his evidence. Whether the plaintiff did it himself, or was a tool in the hands of others, was another question. Continuing, his lordship said that he was of opinion that they had not got the real criminal yet, but the plaintiff seemed to have been assisted by some knave who had not sufficient sense to commit forgeries in such a way as to possibly deceive anybody. Mr. Leibbrandt's undoubted handwriting had been put in, and it was perfectly clear that he never signed these documents in the ordinary way. If he signed them at all he must have feigned the signatures. From some of the documents it appeared there would be no motive whatever for signing a feigned signature, with reference to the receipt for 15s. for instance, because undoubtedly the 15s. had been paid to him, and he admitted

that he received the money and that he gave the receipt, and there was no reason why he should feign a signature on this receipt without any motive whatever, for he could never suppose that this would be brought up in evidence. His lordship observed that he was satisfied that the signatures on the notes were forgeries, and gave judgment for both defendants, with costs.

[Plaintiff's Attorney, J. Hamilton Walker; Defendant's Attorney, P. M. Brink.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. 19th May, Justice BUCHANAN, and Mr. 1892. Justice UPINGTON.]

IN RE VERSFELD, AN ALLEGED LUNATIC.

De lunatico inquirendo—Act 35 of 1891, Section 33 (2)—Judge's order—Summons—Practice.

The Attorney-General (Mr. Innes, Q.C.) appeared as *curator ad litem* for the alleged lunatic.

This was the first case in which an alleged lunatic had been brought before the Court by virtue of a judge's order in Chambers, under Act 85 of 1891, section 33 (2).

It appeared from the statement of the Attorney-General that Versfeld had been an inmate of Robben Island Asylum in 1880, 1885, and again in August, 1891. On each occasion he had come as a voluntary paying patient. When the Act of last year was promulgated, it became clear that the detention of Versfeld was, strictly speaking, illegal, inasmuch as no provision existed under the old Act for detaining voluntary patients. In consequence the Surgeon-Superintendent had Versfeld sent over to Cape Town with a view to proceedings being taken *de novo*. After the alleged lunatic had been examined by Drs. Fisk and Landsberg, the Magistrate, upon the doctors' report, granted a summary reception order under section 27 of the Act detaining him. The papers were afterwards sent to the Attorney-General and thereafter were laid before a judge in Chambers (Mr. Justice Upington), who granted an order in terms of section 33 (2). Some difficulty was experienced as to who should issue the summons. The Registrar did not feel justified in doing so, and the Attorney-General could not, as he was the *curator ad litem*.

Mr. Innes, Q.C., remarked that the practice in the Eastern Districts Court and in the High Court

appeared to be that the summons was issued by the Registrar and directed to the Sheriff, but it would be well if the Court gave a direction as to the practice to be observed in any similar cases which might arise.

Mr. Justice Upington referred to Ordinance 106, and suggested that the Master should issue the summons.

Mr. Innes remarked that it had occurred to him that the Master might be made a party to the suit.

The Chief Justice observed that that would tend to complicate matters, for although the Master should take the initiative where there was property, in the majority of these cases there was no property.

The Court eventually settled the practice by directing the Registrar to prepare and issue the summons and hand the same to the Sheriff. Stamps to be affixed unless judge ordered to the contrary and in the first instance to be supplied by the Attorney-General's Department.

Dr. S. P. Impey, Surgeon-Superintendent at Robben Island, stated that Versfeld came to Robben Island voluntarily, and witness had had charge of him. After the promulgation of the Act of 1891, as there was no order authorising his detention at Robben Island, witness sent him over to the mainland for the purpose of examination, and getting the necessary certificates. Versfeld then returned with the order and the certificates on the 4th August. The condition of Versfeld was that he talked a great deal of nonsense, and had very exalted ideas about himself; he fancied, also, that he was the originator of railways, and that he was married to the Queen's daughter. His health otherwise was good, and he was perfectly quiet and harmless. Versfeld had certainly improved within the last three weeks, and if this improvement lasted he might be in a condition to be discharged. The case was one of recurrent mania; and it appeared from the records that the disease recurs every five or six years. Probably in a month's time he would be in a condition to be discharged, but the mania might recur again in five years. There was no record to show that the lunatic came to Robben Island in charge of any person.

The Attorney-General pointed out that under the regulation No. 5, framed under section 71 of the Act, there was a provision made for the Colonial Secretary discharging a lunatic on probation.

Witness stated that this was a case that might come within such regulation.

The Attorney-General: He would like to go to Mr. Cloete in Stellenbosch.

The Chief Justice (addressing Versfeld): Do you wish to go back to Robben Island?

Versfeld (who appeared to be perfectly rational)

replied that according to the opinion of the doctor he had better go back until arrangements were made for him to proceed to Mr. Cloete. He did not know whether his brother would take him in.

Dr. W. J. Dodds, superintendent of the Valkenberg Asylum, stated that he did not think Versfeld was of perfectly sound mind. Versfeld told him two months ago that two large nails had come out of his ears. Many of his statements appeared to be contradictory. He was of opinion that he might be discharged on probation if there was anyone to take a general interest in him. Under the regulations the lunatic could be sent back to Robben Island at once.

Mr. Justice Buchanan: The question is whether he is of unsound mind.

The Attorney-General suggested that Versfeld should be detained for a month to ascertain if his friends would receive him, and he (the Attorney-General) could report as *curator ad litem* within a period of a month.

The Chief Justice: Have you considered, if the Court had to appoint a curator, whom we should appoint?

The Attorney-General said he thought the lunatic's brother should be appointed.

The Chief Justice: But the brother seems to have taken no interest in the matter.

The Chief Justice (to Dr. Dodds): From what you have seen, are you prepared to say that he is of unsound mind?

Witness: I do not think he has quite recovered from his attack. My reason for that is his stating to me that he is unable to manage his own affairs, his statement about the nails, about railways, &c. I certainly think he is of unsound mind.

Dr. Fisk also gave corroboratory evidence regarding Versfeld's mental condition.

The Chief Justice asked what section gave the Colonial Secretary power to discharge a lunatic on probation.

The Attorney-General said it was under the regulations framed under section 71.

The Chief Justice said the evidence as to Versfeld's unsoundness of mind was not very strong, but at the same time they must consider the interests of the man himself. They had the evidence of the doctors that he was not of sufficiently sound mind to take care of himself or property. There appeared to be no person to take charge of him at present, and if he were discharged now he would be thrown on the world without a home to go to. Under these circumstances the best course to adopt was to declare him of unsound mind, and appoint Dr. Impey curator of his person and his brother curator of his property, and the effect of this order would be that Dr. Impey, when the man had regained his reason, would report to the Court, and the man would be discharged. But until such report was submitted,

he safest course was to send him back to Robben Island, he himself being willing to go back. His lordship gave judgment accordingly, and said he supposed that Versfeld would be able to pay the costs in these proceedings.

The Attorney-General stated that the costs would be very small, as no summons was taken out.

The Chief Justice said the curator would be justified in paying any costs out of the estate of Versfeld.

PROVISIONAL ROLL.

JULIUS HORN AND CO. V. HOFER.

Mr. Schreiner, Q.C., for the plaintiffs, moved for provisional sentence on two promissory notes for £50 each, with interest.

Mr. Searle appeared for the respondent, and said that plaintiffs were the agents of a Hamburg firm, to whom the money was alleged to be due. As a fact, interest on the money had already been paid by respondent, having been included in an account current between the parties.

The Chief Justice: Should not the Hamburg firm appear on the record as plaintiffs?

Mr. Schreiner thought not, seeing that the plaintiffs were their duly-appointed representatives in this country. The plaintiffs did not sue personally, but in their representative capacity.

Mr. Searle said that from the correspondence put in the plaintiffs themselves admitted that the amount due was not £100.

Mr. Schreiner said that the exact amount was £72 7s. 10d.

Mr. Searle said that the case was of such a nature that it could not be settled provisionally, as the liquidity of the notes had been destroyed. He referred to "*Preuss and Another v. Ames*," L.R. 286.

The Court adjourned the case for a week, in order that it might be gone into more fully.

Postea (May 30).

Provisional sentence was granted for £70 11s. 8d.; execution stayed for a week.

BAILEY AND CO. V. MCCABE'S CURATORS.

Mr. Sheil moved for the discharge of the provisional order, which was granted.

GENERAL MOTIONS.

IN RE THE INSOLVENT ESTATE OF IGNATIUS P. H. OLIVIER.

Insolvency—Sale of landed property—Refusal of insolvent to give up possession—Ejectment—*Locus standi* of Trustees.

Mr. Searle moved for an order requiring the said insolvent and other persons in occupation under his authority to quit and give up possession of certain portions of Langverwacht, Buffelsjachtfontein, and Waterkloof, in the division of Oudtshoorn.

It appeared from the affidavit of Mr. James Alexander Foster, one of the trustees, that the insolvent at the time of the sequestration of his estate was the registered proprietor of the immovable property above mentioned, which on his insolvency became vested in his trustees.

That on the 12th January, 1892, the trustees caused the said properties to be sold by public auction, when they were purchased by one Christoffel J. Coetzee, who joined in the present application.

That, in pursuance of such sale, transfer was effected to the said Coetzee.

That the purchase money had been deposited in the Oudtshoorn branch of the Standard Bank by the purchaser, with instructions that it was not to be paid over to the trustees until they had given him possession of the said land.

That the insolvent and his children were occupying the houses on the said properties, and declined to give up possession to the trustees or to the purchaser.

That the insolvent had been twice insolvent, and had purchased the property from the trustees in his first insolvency in 1878.

That the said land was originally transferred to the insolvent in terms of the will of his wife's parents.

That the insolvent, as before stated, purchased the property from his former insolvent estate, and maintained that, in terms of the will, the trustees were bound to sell to one of the co-heirs under the will, and for that reason declined to give up possession.

The will bequeathed all the landed property in the estate to the eight children of the marriage for the sum of 6,800 rix-dollars, and provided that each of the major children should be bound, after the death of the first dying of the testators, to pay out to the survivor 100 rix-dollars, the balance to bear interest till after the death of the survivor, and if one of the heirs should desire to cede his right, then again to the other owners for the same sum for which he had inherited the same, with exceptions of his improvements, which should be valued by two arbitrators, and which should be paid out according to valuations, but not on any account to a stranger.

Mr. Searle, in support of the application, contended that the insolvent could not set up the will as a defence. The property having been sold in the first insolvency, was free from the *fidei commissum*. He referred to "*Du Plessis v. Smallberger*, 8 Searle", 388.

Mr. Juta appeared for the respondent, and con-

tended that the trustees, who now sued, had no *locus standi*. As to the transferee, he submitted that he had not yet made a demand upon the insolvent. In any case, he asked the Court to say that a man could not be ejected merely upon motion.

The Chief Justice said that the trustees had very great interest in the matter, because there had been a sale by auction, and the trustees were bound to give possession of the property. The objection was merely a formal one.

Mr. Justice Upington: Was not the insolvent diverted of his title by the act of insolvency?

Mr. Juta said that that point had to be decided. As a fact, the respondent's brother, a co-heir under the will, offered the same amount as the transferee, but the trustees refused to accept it.

Mr. Justice Buchanan: What right has the insolvent to protect his brother? When the insolvency takes place the insolvent's title is surely upset.

Mr. Juta said that there was no evidence before the Court to the effect that the insolvent was aware of the sale at all.

The Chief Justice said that where an insolvent improperly withheld title deeds the Court would order him to give them up, and there was no reason why the same course should not be followed in a case in which the Court was asked to eject an insolvent from land which he improperly continued to occupy. It was quite true that the trustees had already transferred the land to the purchaser, but they were bound to give the purchaser peaceable occupation and so must come into court against the insolvent. If there were any technical difficulty in the way that was removed by the fact that the purchaser had been joined as co-applicant. It was said, however, that the brothers of the insolvent had certain rights in respect of the farms. They did not seem to have protected their interests by being present at the sale. The insolvent had nothing to do with his brothers' rights. Let them come forward and protect those rights. The only course now, he thought, would be for the brothers to assert their rights, if they had any, by action against the trustees or the purchaser, as they might be advised. As far as the insolvent was concerned, he had no further interest, and must give up the land. The application would be granted with costs.

IN RE REINHERS VON LAER AND CO. V. FEHR.

Rules of Court, 38, 39, and 40—Appeal to Privy Council—Recognizances—Security—Principal—Sureties.

Mr. Schreiner, Q.C., moved for an order under the 40th rule of Court, authorizing the recog-

nizances entered into, in respect of their sufficiency, in the appeal allowed in the matter between the parties to Her Majesty in her Privy Council.

Notice of the motion had been given to the respondent's attorneys, and they had consented.

The Registrar pointed out to the Court that the 38th and 39th Rules of Court had not been complied with, inasmuch as the bond had not been signed by the principal, although it had been signed by the members of the firm of Rolfe, Nebel & Co., as sureties in *solidum* and joint principal debtors with Fehr.

The Chief Justice directed Mr. Schreiner's attention to the omission.

Counsel contended that where the attorneys for the other side had consented, the function of the Court was purely formal.

The Chief Justice: I am informed by the Registrar that the Privy Council insist upon recognizances being strictly in order.

The Court made no order on the application.

The Chief Justice remarked that in view of the decision *"In re Horsburgh"* (58, L.J., Ch. 237), it might be better that an action should be instituted in the Supreme Court.

Mr. Schreiner remarked that his lordship's suggestion would be conveyed to the appellants.

IN RE THE PAARL BANK.

Mr. Schreiner moved for the sanction of the Court to certain compromises proposed to be effected with debtors and shareholders by the official liquidators of the said bank.

The compromises, particulars of which have already been published, were confirmed by the Court.

PETITION OF CATHERINE H. KRUGER.

Mr. Jones moved for an order authorizing the Registrar of Deeds to cancel certain mortgage bond for £200, passed by petitioner's former husband, Jacobus Stephanus Minnaar, of whose estate she is executrix testamentary, in favour of the Cape of Good Hope Savings Bank, on the 19th November, 1881, it being alleged that the said bond had been satisfied but since been mislaid or lost.

The order was granted.

IN RE PETITION OF MEYERS.

Mr. Tredgold moved for confirmation of the resignation of the trustee to the ante-nuptial contract of petitioner and Annie M. Williamson, and for the appointment of a new trustee in his stead.

It appeared that provision had been made in the ante-nuptial contract for the appointment of new trustees, so that the application to the Court was unnecessary and consequently no order was made.

IN RE REGINA V. JAMES MASON } 1892.
JONES. } 19th May.

Vagrancy—Act 23 of 1879, Section 4—Act 27 of 1889—Alleged contravention—Conviction—Sentence—Conviction quashed on appeal.

Mr. Schreiner, Q.C., appeared for the appellant; Mr. Giddy for the Crown.

This was an appeal from a sentence, imposing a fine of £2 or seven days' imprisonment, passed upon the appellant by the Assistant Resident Magistrate of Kimberley, on a charge of contravening Act 23 of 1879, section 4, as amended by Act 27 of 1889; in that, upon, or about the 30th day of March, 1892, and at or near (the farm) Alexandersfontein, in the district of Kimberley, the accused did wrongfully and unlawfully, and without the permission of the owners, to wit, the London and South African Exploration Company (Limited), wander over the farm Alexandersfontein, in the district of Kimberley aforesaid.

The facts appear sufficiently from the appellant's evidence which was given at the trial, and which was as follows:

I am in the employ of the De Beers Consolidated Mines. About ten days ago I heard remarks that prospecting was going on on the London and South African Exploration Co.'s property. My boy told me that prospecting was being carried on by Armstrong by night only. This was last Monday week. I instructed my boy to try and find out where the prospecting was going on. Isaac (Armstrong's servant) offered his services to me through my boy. I would not have anything to do with him because he was in Armstrong's employment. I did not go to any of Armstrong's boys, nor to their houses, except to Abraham. I told my driver to tell Abraham that I wished to see him. Abraham had been in my employment some years ago. I asked him if he were doing any work, and he said "No," he had only just come from Johannesburg. I asked him to work for me, and he agreed to do so. I said "I have heard that the Armstrongs are prospecting at night, do you think you can find out where they are?" He agreed to try and find out. This was on the 29th March. I saw him again on Wednesday morning. He was with a boy, who, I was told, was named Johnny, he told me that Johnny was

working with Armstrong. I said I would have nothing to do with him. I sent £5 to Abraham. About four p.m. he came to me again, and told me that he had found out where the spot was and what it was, near the pan on Alexandersfontein. His evidence as to his interview with me was generally correct. He told me that if I went out with him, I should see the lights. I agreed to go out with him. The Bultfontein floors are about a mile and a half from this vley. The fact of prospecting going on at night-time made me suspicious. I had heard rumours that prospecting was going on on the De Beer's floors. I went out to see if Abraham had given me true information as to Armstrong's prospecting. I went with Abraham. I never travel with lights. I can see the road better without them. Abraham said if they heard us coming on, they would put out the lights. When I get out of the cart I went towards the lights. I came simply with a view to find out if prospecting was going on. I stooped down several times to get a view of the lights, and I was looking at them through my opera glasses. I thought I heard whispering, and I became suspicious, and I told Abraham to move off from me a little. I lost sight of him. After going a little way I decided to go back to my cart. I walked back and jumped into the cart, and sat there waiting for Abraham. The cart waited there about five minutes after I got in. I saw a boy, who, I thought, was Abraham. He called out to my driver and asked if the Baas was in the cart. I told the driver to say I was, he said, "Tell the Baas to come here." I then told the boy to come to me, he would not. I told my boy to drove on. The boy then made a rush at my horses' heads. I drove into Beaconsfield. Armstrong has since told me that had they caught me, they would have ducked me. He said "This is the £5 which you gave my boy, and I intend to give him another £5."

Cross-examined: I have to watch over the De Beer's property, and report to them as to properties. I reported the rumours of work being done on the floors to my principals. I had heard no rumours about prospecting going on at my Company's floors at Bultfontein in particular. I received no special instructions about the mine at Ronald's Vley. I had not previously been out at night. I did not know Armstrong was prospecting until my boy told me. Abraham said he had given the £5 to the boy, he did not say what boy I did not ask Abraham where he got his information. It was not my business that Abraham went to Armstrong's boys. One of the lamps in the cart was lit. I said I never travelled with lamps, and had it put out. When I first saw the lights, I was about one and a half miles from my Company's property. I wanted to see whether the boy had given me true information. The boy told

me that the shaft was covered by day, and that ground was put on the top of it. I left my cart, as I thought, on the road. I was not on the road all the time. My object was to get as close as I could to the lights without being seen by anyone else, and with that object I used my opera glasses. I began to be suspicious, and thought there was a trap. I walked back to the cart. I did not run. At one time I walked fast. I did not hear anyone running after me.

By the Court: The amount of wandering I did was to walk about 800 yards from the cart and back to it. My object was to see whether working was going on. My object in returning was to get into my cart. I was told that prospecting was going on without leave of the London and South African Exploration Company. There would be a certain amount of danger in going up to an unauthorised prospector. I have no official connection with the London and South African Exploration Company. About a quarter of an hour or twenty minutes elapsed from my leaving my cart and my getting into it again. The nearest point I was in my drive that night to the De Beer's property was about 600 or 700 yards. I wished to see what was going on without being seen. I was told by the boy that if I was heard the lights would be put out, and I should not see the workings. Had I seen a prospector at work, I should have made myself known to him the next day—not that night—because I did not know what he might have done to me. When I got out of my cart, I thought I was in the London and South African Exploration Company's property. I knew I was not on the property of the De Beers Consolidated Mines.

The accused was found guilty, and fined £2 or seven days' imprisonment, and from this sentence he now appealed.

Mr. Schreiner said the main point which the Court would have to decide was whether the facts constituted the offence which was charged; whether it could be said that Mr. Jones was "wandering over" the farms.

Mr. Justice Buchanan: Whether, in fact, Mr. Jones was a vagrant.

The Chief Justice: Whether he was an idle and disorderly person within the meaning of the Act.

Mr. Schreiner pointed out that there was no condition or distinction made between one wandering or loitering; and, therefore, the suggestion which his lordship made now seemed to be of great force.

The Chief Justice asked if the Vagrancy Act did not apply, say, to villagers.

Mr. Schreiner: The evidence here was that the alleged offence was committed outside a corporate town. The Act had been popularly read as though the mere wandering on a farm constituted

the offence. There had been no wandering, as his client went there with a specific object; and if he was a trespasser, that was a different matter. His client wanted to find out whether Mr. Armstrong was prospecting there, which was his specific object. Was a sportsman who saw game, and went on to another man's land, to be considered an "idle and disorderly man"? If this judgment were upheld, then all barristers on circuit, if they went off the road to a spring, for instance, might be taken as idle and disorderly persons.

Mr. Schreiner admitted that as a civil trespasser Jones would be liable, but the great point was that the object and purpose of Jones (although it might have been an unlawful purpose) was to see whether Armstrong was prospecting.

Mr. Giddy, after explaining that Mr. Jones had been induced to go there to see Armstrong, and that a trap had been set for him, said the section of the Act was clear that any person found without permission of the owner "wandering over" or "loitering" shall be guilty.

Mr. Justice Upington asked if it could possibly be intended that every person found on a farm without permission of the owner should be deemed and taken conclusively to be an "idle and disorderly" person.

Mr. Giddy said he did not see why anybody should trespass upon another's ground. If there was a main road let him keep to it. Why wander 800 yards off?

The Chief Justice, in giving judgment, said a reasonable interpretation must be given to the Act. There may have been a presumption that the accused was an idle and disorderly person, but that presumption had, in his opinion, been rebutted by the evidence. What was the object of the Act? To prevent vagrancy and squatting. Now, no one would suppose that Mr. Jones was either a vagrant or a squatter. It was clear from the preamble to Act 23 of 1879 that that Act was intended to suppress vagrancy and thefts of stock, which were the evils of this country. But it was not to be supposed that, however improper Mr. Jones's motive was, it was a motive of that kind which influenced him in his nocturnal wandering. He was not on the farm for the purpose of doing any of those mischiefs which the Legislature intended to prevent by the Act. For these reasons, his lordship said he thought the appeal ought to be upheld, and the conviction quashed.

Their lordships concurred.

[Appellant's Attorneys, Messrs. C. and J. Buissonne.]

MACKIE, DUNN AND CO. V. MC- { 1892.
MASTER. { 19th May.

Promissory notes—Accommodation—Woman
—Surety—*Senatus—Consultum Velleianum*
—Non-renunciation—Resident Magistrate's decision affirmed on appeal.
Oak v. Lumsden (3 Juta, 144) followed.

Mr. Searle appeared for the appellants, and Mr. Schreiner, Q.C., for the respondent.

This was an appeal from the decision of the Resident Magistrate of Knysna in an action for payment of certain three promissory notes, amounting to £159 12s. 4d.

The facts of the case were as follows: On the 26th January, 1884, Mr. J. R. McMaster (son of the respondent) wrote to Messrs. Mackie, Dunn & Co., of Port Elizabeth, with a view to dealing with that firm, and suggested the form in which payments for shipments to be ordered by him should be made, namely by promissory notes at six months, bearing the endorsement of his mother (the respondent), a widow, who owned property in Knysna, valued at about £3,000.

Messrs. Mackie, Dunn & Co. wrote on 2nd February, 1884, to Mr. McMaster that the terms offered were satisfactory, and referred specially in their letter to the mother's endorsement.

This correspondence was followed by an order, which was executed on 18th March, 1884, Messrs. Mackie, Dunn & Co. sending to McMaster a promissory note for his signature and for his mother's endorsement.

The first order was followed by others from time to time, the arrangement made in 1884 being adhered to until July, 1890, when Mr. McMaster assigned his estate for the benefit of his creditors.

At the date of assigning his estate McMaster was indebted to Messrs. Mackie, Dunn & Co., on several promissory notes, on an open account, and on the three notes sued on in the Magistrate's Court.

Mrs. McMaster was a party to the deed of assignment, as she had a claim for certain moneys advanced by her to her son. The deed, after in the usual way authorising the assignee to release the debtor after liquidation, contained the following clause: "It is, however, expressly understood and agreed that these presents and any such release aforesaid shall not in any wise prejudice the claims, rights, or remedies of any of the said creditors against any surety or sureties, or any person or persons other than the said James Robert McMaster, or upon or in respect of any security which any creditor may hold or claim."

On 1st February last Messrs. Mackie, Dunn & Co. sued Mrs. McMaster on the three promissory notes referred to above—she pleaded *inter alia* the

S. C. Velleianum, the Magistrate held the plea good, and gave absolution from the instance with costs, from which judgment the plaintiffs (now appellants) appealed.

It was proved at the trial that the defendant was not and never had been engaged in trade, that she had no interest in her son's business, that she accepted and endorsed the notes sued on, as well as many others, merely for her son's accommodation, that she received no valuable consideration for doing so, that the plaintiffs were aware that the notes were accommodation notes, and that they had failed to protect themselves by calling upon the defendant to renounce formally, or in any way, her right to avail herself of the privileges and benefits of the *S. C. Velleianum*, and that she never did renounce those privileges and benefits in their favour.

Mr. Searle, in support of the appeal, contended that the respondent was liable on the notes. Similar notes had been signed over a period of six years and had been recognised; the son offered his mother's signature upon these notes with her full knowledge, and it was upon the faith of her having property in the Knysna, as represented by the son, that Mackie, Dunn & Co. had had business transactions with him (the son). Neither the son nor the mother ever told Mackie, Dunn & Co. that they were accommodation notes. The respondent was interested in the business, because she advanced her son £500 before his assignment, and the business was carried on in her premises, for which she received the rent. Therefore Mackie, Dunn & Co. might naturally conclude that she was interested in the business.

The Court, without calling upon Mr. Schreiner, held that "Oak v. Lumsden" (3 Juta, 144) was directly in point, and dismissed the appeal with costs.

[Appellants' Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 20th May,
Justice BUCHANAN, and Mr. 1892.
Justice UPINGTON, K.C.M.G.]

IN RE SAUL JACOBS.

Extradition—Act 22 of 1882, Section 8—
Insolvency—Ordinance 6 of 1843, Section
71—Purchase and sale of goods under
value—Promissory notes—Flight of insol-
vent—Fraud—Warrant—Arrest—Appli-
cation to Supreme Court for discharge
refused.

Mr. Juta appeared for the prisoner, and Mr.
Giddy for the Crown.

This was an application for the release of the
prisoner, who had been arrested in Cape Town
under the Extradition Act.

It appeared from the prisoner's petition that he
was arrested in Cape Town on 26th April last,
on a telegraphic warrant, and lodged in gaol, on a
charge of fraud alleged to have been committed
in the Transvaal.

The prisoner denied the charge, and submitted
that the Magistrate in committing him to prison
had not acted in accordance with the provisions of
section 8, Act 22 of 1882, on the grounds that the
allegations in the affidavits upon which the war-
rant had been issued would not, according to the
law of this colony, justify his committal for trial.

The prisoner alleged that he was in Cape Town
for lawful purposes, that he had not taken a
passage for Europe, that it was not his intention
to leave the Colony, as alleged in the affidavits.

Further that he had never dealt with the
persons charging him with fraud otherwise than in
his capacity as a partner of the firm of Jacobs
Brothers, of Pretoria, to whom credit had been
given. That his partner was still in Pretoria,
within the jurisdiction of the Court where the
alleged debts had been incurred. That when he
left Pretoria he considered his firm's position
perfectly solvent.

On these grounds he prayed that he might be
discharged from custody.

The three affidavits upon which the warrant was
issued alleged that the prisoner had purchased
goods from deponents and other persons in Pretoria
and Johannesburg, amounting to £982 6s. 6d., that
after buying goods he realised them at an under-
value, and absconded from the Transvaal with
about £1,000 in cash belonging to his creditors,

with the intention of going to Europe; that a
promissory note which he had given in part pay-
ment of some of the goods had been dishonoured
on maturity.

That a meeting of creditors had been called, and
it was found that there were very few assets left
in the estate, the bulk having been made away
with, as they alleged, by the prisoner.

For these reasons, they asked for a warrant for
his arrest on a charge of fraud.

Mr. Juta contended that the facts alleged in the
affidavits, which were mere questions of opinion
and hearsay, did not amount to the crime of
fraud. If a crime had been committed, it was
against the Insolvency Act of the Transvaal,
which was almost identical with our Ordinance.
The prisoner's estate should have been seques-
trated, and then he should have been arrested
under that Act.

The Chief Justice: But if he had left for
England, what would be the object of sequestration?

Mr. Juta: The man bought the goods, and it was
the duty of the seller to see that he could pay.
There was no fraud.

Mr. Justice Buchanan said there must be a
criminal intent to constitute fraud, and here there
was an allegation of criminal intent, having bought
goods with the intention of selling and not paying
for them.

Mr. Juta pointed out that the petitioner had
made no misrepresentations when he bought
the goods, and there was nothing fraudulent in the
transaction.

The Chief Justice: But if a man with the
intention not to pay buys on credit and then leaves
the country as part of the original scheme, was
that not fraud?

Mr. Juta urged that it was simply a question of
buying goods and not being able to pay. That was
the essence of the case.

Mr. Justice Buchanan thought it might be a case
of fraud as well as culpable insolvency.

Mr. Juta pointed out that the punishment in
each case was very different. If it were fraud
then there was a discretionary punishment to any
extent, whereas for culpable insolvency he could
not be punished with more than by six months'
imprisonment.

Mr. Justice Upington said the allegation was
that he had sold the goods at an undervalue, put
the money in his pocket, and then intended leaving
for England.

Mr. Juta: Then it comes under the Insolvency
Act. There was no evidence that the goods were
sold at an undervalue. With regard to the allega-
tion that the petitioner intended to abscond, there
was no proof on which to ground the belief that
he intended going to England. The petitioner
had left his brother in the Transvaal, and surely,
if there was an intention to swindle, both brothers

would have absconded. No money was found upon the petitioner, and there is nothing to show that he intended taking out a passage for England. The evidence altogether was mere hearsay, and was not sufficient on which to frame an indictment for fraud.

The Chief Justice asked if Mr. Giddy had found any authorities holding that a person buying goods with the intention of not paying for them, and then selling them at an undervalue and leaving the country, was guilty of fraud.

Mr. Giddy said he had not any such authorities, but the principle could be nothing else but fraud. The mere fact that the man left Pretoria and obtained the money by selling the goods under value was evidence of the intention to defraud. There were cases where persons gave cheques which were not met on presentation.

The Chief Justice: But these were cases of false pretences. It must be shown that there was a criminal intent.

Mr. Giddy said the intention of the man must be gathered from his subsequent acts.

The Chief Justice: Would not every act of this man be consistent with perfect innocence? Might that not be so?

Mr. Giddy: The only act consistent with innocence was the actual purchase of the goods.

Mr. Juta urged that there was no fraud, and that the plaintiff must be shown to have done something to induce the seller to part with his goods.

The Chief Justice: But if he gave a promissory note which he never intended to pay; if that were proved, was that not fraud?

Mr. Juta said the seller of the goods sold under the belief that the purchaser was in a position to pay. There must be something wrong done to induce the seller to part with his goods to constitute a fraud. The mere promise to pay was nothing. The seller did not care about the intention of the purchaser, the law compelled him to pay. It was not the intention of paying, but the capability of paying that made the seller part with his property.

The Chief Justice: Do you mean that a man going into a jeweller's shop and purchasing goods, for which he gives a promissory note, and takes the proceeds with no intention to pay, does not commit fraud?

Mr. Juta said the intention must be proved. The time of the intention must be considered. Supposing the next day the man changed his mind, and paid the money? There must be something to show that there was a wilful intention at the time to defraud.

The Chief Justice said a very important question had arisen in this case, and it would be necessary for the Court to consider a few authorities. Judgment would, therefore, be

deferred till two o'clock, till which time the prisoner would be detained.

The Chief Justice, in giving judgment, said the Extradition Act of 1882 contained no provision for an appeal to this Court against an order made by any resident magistrate. He had no doubt, however, that notwithstanding the absence of such a provision it would be competent for any person who was illegally detained to petition the Court for his discharge, and if in the present case the applicant could satisfy the Court that he had been illegally detained, the Court would not hesitate to exercise its power of ordering his discharge. Now, it was admitted in this case, that the prisoner might have been committed for culpable insolvency. He had incurred debts in terms of the 71st section of the Insolvency Ordinance without any reasonable expectation at the time of being able to pay for the same, and his estate had since been sequestrated. The facts clearly showed that the prisoner might have been committed for trial in this colony upon a charge of culpable insolvency. In point of fact, however, the warrant issued by the Transvaal authorities was on a charge of fraud, and the Magistrate in committing the applicant also used the term fraud. The simple question to be determined was whether the use of the word "fraud" in this warrant entitled the prisoner to his discharge. In his (the Chief Justice's) opinion it did not. If the facts disclosed in the evidence clearly showed that the applicant might have been tried in this colony on a charge of culpable insolvency, he was of opinion that the Court ought not to exercise its extraordinary power in favour of the applicant. Supposing the warrant had been in order, and the Transvaal authorities had issued a warrant for culpable insolvency, and supposing the Magistrate here issued his warrant for culpable insolvency, there would be nothing to prevent the Transvaal authorities trying him for fraud. The question which the Court had to determine was: Was there sufficient evidence upon the affidavits which would justify the committal of the prisoner for some crime in this colony? His lordship went on to say that there was a close connection between the charge of culpable insolvency and fraud; in fact, culpable insolvency was a species of fraud. Therefore he thought that at all events there was sufficient connection between the evidence of culpable insolvency and that of fraud to justify the Court in saying that it would not exercise its extraordinary powers in favour of the prisoner and discharge him. Committal for trial, even in this colony, for certain offences was not always conclusive, and the Attorney-General could indict for other offences than that with which the prisoner was charged in the first instance. Under these circumstances he thought, without expressing an

opinion upon the mere general question raised, that the Court ought not to exercise its power, and ought not to discharge the prisoner.*

The application was accordingly refused.

[Applicant's Attorney, C. C. Silberbauer.]

TAMLIN V. TAMLIN.

Mr. Tredgold appeared for the plaintiff; the defendant in default.

This was an action in which the plaintiff sued his wife for divorce, by reason of her adultery. The marriage took place on 26th May, 1880, at the Wesleyan Church, Cape Town, and in 1887 a deed of separation was drawn up, the husband allowing the defendant 12s. per week. There was one child alive by the marriage.

Evidence of the adultery having been given, the Court granted a decree of divorce, and ordered the plaintiff to have the custody of the child.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

VENTER V. ZIMBA. { 1892.
 { 20th May.

Stallion—Action for delivery—Identity—Evidence.

Resident Magistrate's decision affirmed on appeal.

Mr. Schreiner, Q.C., appeared for the appellant, and Mr. Searle for the respondent.

This was an appeal from the judgment of the

* The Chief Justice, at the conclusion of his judgment, referred to the case of *ex parte Plot*, 15 Cox, 208, the head note of which is as follows:

A French subject and fugitive criminal was apprehended in England upon a warrant issued by the chief metropolitan police magistrate, after notice from the Home Secretary that a requisition had been made for his extradition under the treaty with France (1878) for the surrender of fugitive criminals, and he was committed under section 10 of the Extradition Act, 1870.

In the foreign warrant issued in France the prisoner was accused of the crime of "abus de confiance" and by Article 3 of the treaty, one of the crimes for which extradition is to be granted, is "abus de confiance ou détournement par un dangerier, commissaire, a-ministrateur," &c.

In the police magistrate's warrant of committal the offence was described as "fraud by an agent."

Held, that the description of the offence in the warrant was sufficient, and that the facts upon the depositions disclosed a prima facie case of fraud by an agent within the meaning of 24 and 25 Vic., c. 86, s. 75, to justify the prisoner's committal for trial if the offence had been committed in England, and therefore the magistrate was right in committing him under the Extradition Act.—Ed.

Resident Magistrate of Queen's Town, delivered at the Periodical Court, Whittlesea, on the 16th March, in an action in which the present respondent sued the appellant (defendant in the Court below) for the delivery of a stallion, or its value, £8, and £2 damages for its detention.

The Magistrate gave judgment for the plaintiff on his first claim, and absolution from the instance on the claim for damages.

The defendant now appealed.

The plaintiff in his evidence swore that he lost a stallion, about three years old, from the farm "Success," from the possession of one Gabella, to whom he (plaintiff) had given the stallion to be trained. That he subsequently found the stallion on defendant's farm and claimed it.

The defendant refused, however, to give it up alleging that it was his.

Xayimpi, a headman, and other witnesses were called for the plaintiff, and identified the stallion as being his.

The defendant and several other witnesses swore that the stallion was his.

Mr. Wm. Wainwright, an expert on the subject of horses, was called by consent of both parties.

He examined the stallion in the Court yard and expressed the opinion that the animal was rising three years old, but that it would be impossible to tell a horse's age to a month.

Mr. Schreiner: This is not a case in which the findings of fact are so much in dispute as the correctness of the Magistrate's inferences. No doubt there was strong evidence on each side as to whether the horse in dispute was the plaintiff's or defendant's. But on that evidence he had not made up his mind.

The evidence of Wainwright cannot be taken as supporting the plaintiff and must be discarded.

The weight of evidence is in favour of the defendant's claim that the horse is his.

The Chief Justice said the case appeared to him to be a question of identity, and he could not say that the Magistrate was wrong in the conclusion at which he had arrived. The Magistrate had the horse before him, and he appeared to have gone very carefully into the whole matter, and the reasons given for his judgment were very sound. There was one feature of the case that was of some importance, that the plaintiff's witnesses swore that the horse was a well-trained colt, and the defendant said he lost a horse that was entirely untrained. It did not seem likely that in three months it could be transformed from an untrained into a well-trained horse. It was quite true that the horse was not tried before the Magistrate, but the defendant might have asked the Magistrate to try whether the horse was trained or untrained. They must assume that the horse before the Magistrate was a well-trained horse. This was the point that must have

weighed heavily with the Magistrate. The appeal would be dismissed with costs.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinne; Respondent's Attorney, John Ayliff].

QUIN BROTHERS V. VAN DER MERWE. { 1892.
20th May.

Insolvency—Ordinance 6 of 1843, section 120—Debts incurred before insolvency—Alleged new consideration—Resident Magistrate's judgment varied on appeal.

Mr. Searle appeared for the appellants, and Mr. Juta for the respondent.

This was an appeal from a decision of the Resident Magistrate of Prince Albert, giving judgment for the defendant (present respondent) in an action brought against him for £11 2s. 6d., less £1 8s. 6d. paid on account, being the balance due on certain goods supplied to the defendant in the years 1886 and 1889.

The defendant pleaded the general issue, and specially that since the date of the alleged liability his estate had been sequestrated as insolvent and that he had since been rehabilitated. With regard to the £1 8s. 6d., he pleaded payment of that amount before issue of summons.

With regard to the plea of general issue, plaintiffs' attorney asked for a postponement for the purpose of administering interrogatories. He further alleged that the defendant had promised to pay the old account of £9 14s., before credit was given for the £1 8s. 6d., and cited "Dicks v. Pote," (3 E.D.C., p. 74). He admitted that defendant had been insolvent, but had been rehabilitated as stated in the plea, also that several demands had been made upon the defendant for the £11 2s. 6d., and that the defendant had denied his liability with the exception of the £1 8s. 6d. for goods bought after his insolvency, and which amount the plaintiffs afterwards accepted.

The Magistrate gave judgment for the defendant with costs, holding that "Dicks v. Pote" above cited did not apply.

The plaintiffs appealed.

After argument,

The Chief Justice, in giving judgment, said: The plaintiffs sued for debts incurred in November, 1886. It is admitted that in 1887 the defendant became insolvent, and has been rehabilitated. The law is stated in the 120th section of the Insolvency Ordinance to the effect that every certificate when allowed by the Supreme Court shall have the effect to discharge the insolvent from all debts due by him at the time his estate was surrendered, and from all claims or demands proved or made provable or in any manner claim-

able against his estate. Therefore the certificate is a complete discharge of the debts for which the defendant was sued. But the plaintiffs rely upon a promise and allege that this is the true cause of action, but that cannot be proved under the summons as it stands in the Court below. The judgment of the Magistrate would not prevent the plaintiffs from suing on the promise in a fresh action, but in order to prevent any difference arising on the subject—and as Mr. Juta, for the respondent, consents—the Court will alter the judgment of the Court below into one of absolute from the instance, not because the judgment of the Magistrate was wrong, but because the respondent consents to the alteration. This will not affect any question as to costs in the Court below.

The appeal must be dismissed, with costs here and in the Court below.

[Appellants' Attorney, O. C. Silberbauer; Respondent's Attorneys, Messrs. Van Zyl & Buissinne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] May 23rd, 1892.

ROUX V. BRITTAİN.

Broker — Agency — Commission — House — Sale — Evidence — Resident Magistrate's decision affirmed on appeal.
McConochie's Executrix v. Bidwell-Edwards (ante p. 155) distinguished.

Mr. Juta appeared for the appellant, and Mr. Searle for the respondent.

This was an appeal from the decision of the Resident Magistrate at Cape Town, in an action in which the appellant (then defendant) was sued by Mr. Brittain, broker, for the sum of £2 10s., commission on the sale of certain property for £50.

It appeared from the evidence that Roux had asked Brittain to sell certain two houses belonging to the former.

Thereafter Brittain approached one Walsh on the subject, and Walsh made an offer of £40, subsequently increased to £50, for one of the houses.

The letter containing this offer was handed by Brittain to Roux, who declined to accept the offer, saying that he would not sell one house without the other.

Subsequently Roux sold both houses direct to Walsh for £100. Whereupon Brittain claimed his commission.

Roux refused to pay.

In an action in the Resident Magistrate's Court for the brokerage judgment was given for the plaintiff with costs.

Roux now appealed.

The Magistrate's reasons were as follows:

"I am quite satisfied from the evidence in this case the defendant employed the plaintiff to sell the houses in question, that he negotiated between them, and that he really was the means of bringing them together, or of their coming together, when they came to terms and threw the plaintiff over. It was evident in court that plaintiff and Walsh were not on good terms. I am satisfied also that Brittain disclosed Walsh's name to defendant, and that he must have known when Walsh spoke to him that he was the person Brittain had been treating with.

"It has been decided that if a broker merely brings the parties together, although they arranged the sale between them without reference to him, that he is entitled to his brokerage. The broker in this case did a great deal more, and I consider that whether it is called brokerage, or commission, or any other term, the plaintiff fully earned the 50s. which he claims."

After argument,

The Chief Justice, in giving judgment, said, in the recent case "*McConachie's Executrix v. Edwards*," the Court found that there was no evidence to justify the Magistrate in holding that the sale, in that case, had taken place through the agency of Edwards. In the present case he was of opinion that there was evidence to justify the Magistrate in holding that the sale did take place through the agency of Brittain. He was satisfied from the evidence that but for the intervention of Brittain Walsh would never have known of the two houses being for sale, and that the sale would never have taken place. In this it differed from the case of "*McConachie v. Edwards*." In that case they were perfectly satisfied from the admitted facts that it was not in consequence of Edwards's conduct that the sale took place, but in consequence of the advertisement which Mrs. Dixon had seen, and through which she induced her husband to buy, the former negotiations having fallen to the ground. In the present case it was quite clear that, but for Brittain having mentioned the fact to Walsh that these two particular properties were for sale, the two parties would never have come together, and the sale would never have taken place. The Magistrate had the witnesses before him, and he seemed to have believed the evidence of Mr. Brittain. The Court must be guided by the impression which the evidence made upon the Magistrate. Taking

Brittain's evidence as giving the correct version, he thought there was sufficient evidence to justify the Magistrate in the conclusion to which he arrived, that conclusion being that the two properties had been mentioned by Mr. Roux to Brittain as being for sale, and that Roux had requested Brittain to sell them, and promised him a commission of 2½ per cent. That agency was never withdrawn. There was no intimation given to Brittain that his agency had been withdrawn. Roux availed himself of the information given to Walsh. He also availed himself of the knowledge which Brittain had given him of the custom in the trade, and having so availed himself he (the Chief Justice) thought that Brittain was entitled to his commission. Under these circumstances, the appeal would be dismissed with costs.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Wessels & Standen; Respondent's Attorney, C. C. Silberbauer.]

WOOD'S TRUSTEE V. S.A. MUTUAL LIFE ASSURANCE COMPANY. { 1892.
{ May 23rd.

Life policy—Yearly premium—Payment by instalments—Interest—Insolvency—Death of insured before current instalment of premium had been paid—Subsequent payment by trustee—Receipt by insurer's agent—Ignorance.

Mr. Searle and Mr. Tredgold appeared for the plaintiff, and the Attorney-General (Mr. Innes, Q.C.) and Mr. Schreiner, Q.C., for the defendants.

This was an action instituted by the trustee in the insolvent estate of the late Mr. Alfred Wood against the defendants for the sum of £500, being the amount of a life policy issued by the defendant company to Mr. Wood.

The declaration alleged that the plaintiff was the trustee in the insolvent estate of one Alfred Wood, now deceased; that the said Wood surrendered his estate at Pretoria, in the South African Republic, on or about 6th December, 1890, and that the plaintiff was duly appointed trustee on or about 2nd February, 1891.

That the defendant company is a duly incorporated company, carrying on business in this colony and elsewhere as a Life Assurance Company, under the provisions of Act 6 of 1888.

That on or about 14th November, 1889, the said Wood insured his life with the defendant company for the sum of £500, and a policy of assurance was duly issued to him by the said company upon payment of the half-yearly instalments of premium as therein provided, to wit, the sum of £5 8s. 4d.

That thereafter the said policy continued in

force, and the half-yearly instalments upon the same have been from time to time duly paid.

That the said Wood died on or about 18th May, 1891, but although all things have happened, all times have elapsed, and all conditions have been fulfilled necessary to entitle the plaintiff to recover the sum of £500, being the amount of the said policy, and also the accumulations thereon, yet the defendant company has declined to pay the said sums of money to the plaintiff or any portion thereof.

The plaintiff claimed :

(a) The sum of £500 with interest *a tempore morae*.

(b) Such accumulations as are due under the terms of the said policy.

(c) Such alternate relief as may seem meet.

(d) Costs of suit.

The plea admitted, *inter alia*, that at the option of the insured the premium was made payable half-yearly on the 1st days of May and November, and that on the 1st May, 1891, a half-yearly premium of £5 8s. 4d. became due and was due, and thereafter remained and was unpaid at the time of the death of the insured on the 18th May, 1891, but the defendants admitted that the previous premiums had from time to time been paid by the insured.

The defendants also admitted that they declined to pay the plaintiff the amount insured under the said policy and accumulations thereon.

The defendants pleaded that by reason of the failure as aforesaid on the part of the insured, or the plaintiff, to pay the aforesaid premium of £5 8s. 4d. due on the 1st May, 1891, and by reason of the death of the insured on the 18th May, 1891, the said premium then remaining unpaid, the said policy lapsed and became null and void, and that the society was not indebted to the plaintiff in the amount of £500 as claimed, or on the accumulations thereon, or in respect of any part thereof.

The defendant company specially pleaded that on the 21st May, 1891, the plaintiff handed to the society's agent a cheque for £5 8s. 4d., purporting to be in payment of the amount of the premium due and unpaid as aforesaid, and the society's agent, in ignorance of the fact that the said insured was dead, received the said cheque, but on ascertaining that fact on the following day, forthwith returned the said cheque to the plaintiff, who refused to receive the same, and that the defendant company now offered the said cheque to the plaintiff.

Wherefore the company prayed that the plaintiff's claim might be dismissed with costs.

The replication was general.

Upon these pleadings issue was joined.

The following notice, *inter alia*, appeared on the back of the policy :

All premiums are due yearly in advance ; they

may, however, be paid half-yearly or quarterly, at the option of the assured, at a moderate increase of rate, shown in the society's printed tables. When paid otherwise than yearly, the unpaid balance of the year's premium will be deducted from the amount of the policy, should the same become a claim by death.

No oral evidence was adduced.

Mr. Searle said : The point raised in this case is an important one, and new. It must be decided by English law, Act 8 of 1879, section 2. Plaintiff contends this was a policy for a year certain, the payment of premium to be by instalments. The policy is not terminable within the year when the two first instalments have been paid. By paragraph 2 of the deed of agreement of the society, all premiums are annual. The clause at the back of the policy is strongly in our favour ; the heading also is "annual premium," all through the premium is treated as an annual one. The condition is absolute here, allowing us thirty days to pay ; these are not ordinary days of grace. The power of forfeiture does not arise until thirty days have elapsed. By paying interest we are allowed to pay half-yearly. The society gets the interests and the insured has no advantage. See "*Sheridan v. Phoenix Life Assurance Company*," 8, H.L.C., 745, and El. Bl. & El. 166. This case is distinguishable by the additional amount paid. *Crawley Life Insurance*, p. 51 ; *Porter on Insurance*, p. 101. As to days of grace, see *Crawley*, p. 49 ; *Porter*, 29-30. As to construction of the policy, see "*Pelly v. Royal Exchange Assurance Company*," 1, Burrows, 241 ; "*Motteux v. London Assurance Company*," 1, Atk., 544. Our premium is due annually. The society could sue for it after the first instalment had been paid. The trustee would have had no answer to an action.

Mr. Schreiner said : The plaintiff must prove the fulfilment of all conditions in order to recover. The society can only pay legal claims. The first payment only insured to the 1st May, and each payment only insured for a half-year. The instalments have not been paid and the life is gone. The primary condition is a life to insure, and here there is none. A payment in error could not alter the plaintiff's position for the better. Was the insured insured at the time of his death ? If he was he was insured without any further payment. The payment by instalments is at the option of the insured. The difference in amounts paid is not, interest, it is payment for extra work necessary. The consideration for the increase is the additional work. The operative part of the policy is subject to the deed of agreement. If at Wood's death there had been a surrender value, and a premium had been due but not paid, the trustee could not have recovered, when the assured dies there is no duty to deal with the surrender value. There is a forfeiture the day the premium falls

due; the thirty days' condition includes the condition of Wood's being alive. Wood being dead there could be no revival. See *Crawley*, p. 49, "*Tarleton v. Staniforth*," 5, T.R. 696; "*Want v. Blunt*," 12, East., 188; "*Simpson v. Accidental Death Assurance Company*," 2, C.B., N.S., 257. The executors could not come forward and make a payment after death; the contract is absolutely void by nonpayment at due date. "*Pritchard v. Merchants and Tradesmen's Mutual Life Assurance Company*," 3, C.B., N.S., 622; "*British Industry Life Assurance Company v. Ward*," 17, C.B., 644. Words of notice, "when paid otherwise than yearly," only refer to death within the first six months. The whole point is, was Wood insured on the day of his death? (*Bunyon Life Association*, p. 36). In this society an insured can at any time decide to pay half-yearly or quarterly. It is admitted that the policy would have lapsed if not paid on November 1.

Mr. Searle, in reply, said: The fact of deducting premiums on death within six months is strong evidence of the annual character of the policy.

Cur ad vult.

Postea (May 27.)

The Chief Justice delivered the following judgment: This is an action on a life policy effected by one Alfred Wood upon his own life with the defendant company. The sum assured was £500, and the annual premium £10 6s. 8d. due on the 1st November. The policy recites that the assured had paid "the sum of £5 8s. 4d., being one half-year's premium for such assurance, until the first day of May, 1890, and had agreed to pay the said annual premium on or before the same day of every succeeding year (or by half-yearly or quarterly instalments in advance, with such additional sum as may be provided by the society's printed tables at the option of the assured)." Then follows the provision, that "if the said annual premiums are duly paid in manner aforesaid, the society will . . . pay to the executors, &c., of the said assured, within thirty days next after proof of death," the sum assured. The half-yearly premiums were paid by the assured until the 1st of November, 1890. On the 5th of December, 1890, his estate was sequestrated as insolvent in the South African Republic, and on the 2nd of February the plaintiff was appointed trustee of his insolvent estate. It is admitted that before the 1st of May, 1891, a notice was posted by the society to the trustees that the half-yearly premium would fall due on that date. The money was not, however, paid on that date. On the 18th of May the assured died. On the 21st of May the trustees sent a cheque for £5 8s. 4d. to the

Pretoria agent of the society, who accepted it in ignorance of the fact that the assured was already dead. On the following day the agent, having ascertained that the assured had died some eight days before, offered to return the cheque, which the plaintiffs refused to accept. He now sues the society for the amount of the policy. It is evident that the plaintiff cannot succeed in this action unless the policy was still in force on the 18th day of May, when the insolvent died. The annual premium, due on the 1st of November in each year, was £10 6s. 8d., but with the privilege of paying it in two half-yearly instalments. The assured availed himself of this privilege, in consideration of which he agreed to pay £5 8s. 4d. instead of half the premium, viz., £5 8s. 4d., every half-year. These half-yearly premiums were due on the 1st of November and the 1st of May respectively. The first question which arises is whether the half-year's payment made in November, 1890, covered the policy for a full year from that date. If this question is answered in the negative, the further question will have to be determined whether the non-payment of the half-year's premium on or before the 1st of May, 1891, and before the death of the assured, deprives the plaintiff of the benefit of the policy. Upon the question whether the November payment kept the policy alive for a year thereafter, it is important to bear in mind that every premium, whether yearly or half-yearly, was payable in advance. The presumption, therefore, is that the benefit of each payment was only intended to extend over the period for which it was made. On behalf of the plaintiff, it has been urged that the benefit of the November payment must extend over the whole year, inasmuch as the premium is really a yearly one, computed from the 1st of November of each year. It does not, however, follow that because the premium is a yearly one the parties contracted upon the basis of the insurance being in force for a full year from the first half-yearly payment. If such were the contract, the assured would be bound to pay the second half-year's premium in each year, whether he desired to keep the policy alive or not. But, whatever doubts might exist in this case, there can, I conceive, be none as to the perfect freedom of action left to the assured. If on the 1st of May, 1891, he, or rather the trustee of his insolvent estate, had decided not to renew the policy, the society could not have compelled him or the trustee to pay the May instalment. It is true that the 5th clause of the notice endorsed on the policy provides that when premiums are paid otherwise than yearly "the unpaid balance of the year's premium will be deducted from the amount of the policy, should the same become a claim by death." This pre-

vision is confined to the case of the policy becoming a claim by death. In such a case, if the representatives of the assured claim the amount of the policy, they must allow a deduction of the unpaid instalment, but that is a very different thing from the assured himself being bound, in his lifetime, to pay the instalment whether he wishes to keep up the insurance or not. Nor does this provision show that the November payment was intended to cover the policy for the whole year. The "unpaid balance of the year's premium" to be deducted must refer to any instalment not yet due on the death of the assured, for it is a condition of the policy itself that the instalments must be paid on the day they fall due. The two instalments amount to more than the annual premium. It is contended for the plaintiff that the difference is the charge made by the society for the risk which it incurs in insuring the life for the full year upon the payment of the first half-year's premium but in the absence of any words showing that the society intended to take this risk, it may fairly be assumed that the charge was made for additional work in keeping accounts, giving notices, and so on, if not for loss of interest as compared with policies on which the premiums are paid yearly in advance. The sum to be paid every half-year is referred to in the policy as a "half-year's premium," but even if it be considered as a mere instalment of the annual premium, payment for the first half-year does not dispense with the necessity of punctual payment for the second. This view is quite in accordance with the decision of the House of Lords in "Phoenix Company v. Sheridan" (8 H.L., 750), where the policy sued upon provided for the payment of the annual premium by quarterly instalments, and contained a provision as to the deduction of the unpaid balance in case of death, very similar to the provision I have commented upon. In view of the enactment that in actions relating to life assurance the law of England is applicable here, that case cannot be ignored by this Court in construing the policy now in question. If we are correct in holding that the November payment did not keep the policy alive for a whole year, the next question is whether the failure to make the May payment before the death of the insolvent deprives the plaintiff of the benefit of the policy. The body of the policy stipulates that the payments must be made on or before the day on which each falls due. This is a condition precedent to the right of the policy-holder to recover. It has not been seriously contended on behalf of the plaintiff that the temporary acceptance of the cheque by the agent of the society after the death of the assured, in ignorance of his death, could revive the policy if it had already lapsed. The only ground,

therefore, upon which the plaintiff can base his claim is that the policy is protected by the second clause of the notice indorsed on it. That clause reads thus: "In case the premium on any policy shall not be paid within thirty days of the date on which it shall become due, the society shall from the surrender value of the said policy cause to be paid the premium for one year in advance, together with such fine as the directors may impose, and in the event of the surrender value being insufficient to pay such premium and fine, the said policy shall be forfeited and the surrender value thereof shall become the property of the society; but in the event of the assured desiring to revive such policy, the directors are empowered to receive the premium at any time within such thirty days without proof of health; and they are further empowered to revive a policy which may have become forfeited at any time upon payment of such fine, and upon such other conditions as they may from time to time fix and determine." It is admitted that at the date of the death of the assured the policy in question had no surrender value. Clearly, therefore, this clause does not protect the policy. But supposing the policy had a surrender value, the clause assumes the assured to be alive at the date on which the premium falls due. Within thirty days from that date the directors may apply the surrender value towards payment of the premium, and of such fine as they might impose, or they may allow the policy-holder to revive the policy upon payment of the premium without proof of health. Even after the thirty days they may allow the policy to be revived upon certain conditions. But whether the policy be revived before or after the thirty days the terms of the clause clearly show that the days of grace were only intended to apply to the case of the assured being alive within the period. It is satisfactory to learn from the secretary's letter of 8th March, 1892, that a bye-law has been adopted since the death of the insolvent which will give the representatives of a deceased assured person thirty days of real grace to pay the premium. The reason given by him for refusing to pay the plaintiff is that it would be a fraud upon the other members to pay him. Seeing, however, that policies on the lives of persons dying after the date of the bye-law will, according to the secretary, have the benefit of its very liberal provisions, it does not seem unreasonable to suppose that the other members would not have objected to the payment of the present policy. The loss, if any, to individual members would be so infinitesimally small as to be inappreciable, whilst, on the other hand, it is to their interest that, in the absence of fraud, all policy-holders should receive the most liberal treatment consistent with existing bye-laws. These, however, are considerations which cannot enter into the

decision of the legal questions which have been raised. The defendant society have made good their legal defence, and judgment must accordingly be given in their favour with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendants' Attorneys, Messrs Reid & Nephew.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 27th May,
K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. 1892.
Justice UPINGTON, K.C.M.G.}]

REHABILITATION.

On motion from the Bar, the rehabilitation of Stephan Petrus Naudé was granted.

GENERAL MOTIONS.

IN RE PETITION OF LUDWIG WETZEL.

Mr. McLauchlan moved, on behalf of petitioner for leave to sue in *forma pauperis* in an action against his wife for divorce, by reason of her adultery.

The matter was referred to counsel for his certificate.

IN RE PETITION OF P. C. REYNHARDT.

Mr. Graham moved for an order directing the Registrar of Deeds to issue to petitioner a certified copy of a deed of transfer of certain piece of perpetual quit-rent land called Goedgeronden, in the Tulbagh division, passed on the 4th February, 1890, the original having been searched for but not found.

The Court granted the order.

IN RE PETITION OF ELIZABETH THUNNIS.

Mr. Graham moved for leave to sue in *forma pauperis* in an action for damages against Warner & Co., in respect of the death of her husband, caused by an explosion of gunpowder at their factory, where petitioner's husband was employed.

The matter was referred to counsel for his certificate.

IN RE ESTATE OF THE LATE JAN T. GEERTSMA.

Mr. Shell moved for authority to the Registrar of Deeds to cancel certain mortgage bond for £100, passed by the said Geertama on the 5th October, 1886, in favour of James Thomas Butler, the same having been duly satisfied, but proof thereof as required by the Deeds Office regulations not being able to be produced.

The Court granted the necessary authority.

COPELAND'S LIQUIDATOR V. COLMAN.

Mr. Graham moved for authority to the Registrar of Deeds to issue a copy of certain mortgage bond for £150, passed by the respondent in favour of the said Copeland, the original having been lost, and for the attachment of the landed property therein mortgaged *ad fundandam jurisdictionem* of the Court in proceedings to be instituted by edictal citation for the recovery of the amount of the said bond.

Mr. Justice Buchanan pointed out that the Court had laid down a rule that these applications should come before the Registrar of Deeds in the first instance.

Mr. Graham said that there was nothing in the regulations that applied to lost bonds.

The Chief Justice said it was necessary to have the Registrar of Deeds' report in all these applications.

The Court granted an order for the attachment of the landed property, and leave to sue by edictal citation, to be returnable on the 12th July; but refused to depart from the usual custom of the Court with reference to the necessity of a report being furnished by the Registrar of Deeds.

At a further stage, Mr. Graham read a report from the Registrar of Deeds, and the Court granted a rule *nisi*, returnable 12th July, calling upon parties interested to show cause why a copy of the bond should not be given, notice to be advertised once in the *Government Gazette*.

REINERS VON LAER V. FEHR.

On the motion of Mr. Schreiner, Q.C., the Court granted an order authorising the entering into of the recognisances tendered in respect of the appeal to Her Majesty in her Privy Council in the suit between the parties.

VAN NIEKERK V. VAN NIEKERE.

Mr. Seale appeared for the applicant, and Mr. Schreiner, Q.C., for respondent.

This was an application to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties, and giving the custody of

minor children to the mother, by reason of respondent's failure to obey the order for restitution of conjugal rights.

Mr. Searle said this case had been before the Court on more than one occasion. It was an action brought by Mrs. Niekerk against her husband for restitution of conjugal rights, and had come before the Circuit Court held in Oudtshoorn in March last, when Mr. Justice Buchanan made an order for the husband to return to or have his wife back on or before 25th May. The return day had therefore now expired. Since the order had been granted in the Circuit Court the defendant had offered to receive his wife, and had sent £40 through his attorney for the purpose of defraying his wife's expenses to the Transvaal and paying debts which she had contracted in the Colony. She, however, appeared disinclined to return to her husband unless further sums of money were sent to her.

Mr. Schreiner said there was no malicious desertion. The defendant had tendered £40, which was sufficient to pay Mrs. Niekerk's debts and to enable her to return to the defendant.

The Chief Justice pointed out that the ecclesiastics had been frequently remarking that divorces were too readily given, and there would seem to be some ground for this if the Court were to grant a divorce in a case where there was no malicious desertion, and where a man said to his wife, "Come back; here's the money."

Mr. Searle: In the first place, he must say it in time. He had tendered £15 just two days before the return day.

The Chief Justice: And now he asserts the desertion is on the other side.

Mr. Justice Upington: The question is whether, he having sent an inadequate sum of money, that was not practically desertion.

Mr. Searle: The question is whether there is sufficient money now. He suggested that the case might stand over, in order that the parties might come to an arrangement.

The Court made no order on the present application, which, however, could be renewed if necessary.

MOODIE'S EXECUTORS V. MOODIE { 1892.
AND OTHERS. { May 27th.

Will—Construction—Value of estate over-estimated by testator—Legacies—Abatement—Special case.

Mr. Searle appeared for the plaintiffs; the Attorney-General (with him Mr. Molteno) as *curator ad litem* for the minor children of the tes-

tator; Mr. Schreiner, Q.C., for Mrs. Moodie, and Mr. Juta as *curator ad litem* for the minor children of Mr. Duncan C. F. Moodie, and for other legatees.

This was a special case stated for the decision of the Court as to the proper construction to be put upon the will of the late Mr. George Pigot Moodie, of Westbrook, Rendeboosch, who died on the 2nd November, 1891.

The special case as stated for the consideration of the Court was as follows:

1. The plaintiffs are the executors testamentary in the estate of the late George Pigot Moodie appointed under his last will and testament.

The defendants are: (1) Rosa Maria Pigot Moodie, the testator's surviving spouse; (2) the Hon. James Rose-Innes, in his capacity as *curator ad litem* of George Frederick Arthur, Charles Alfred, Minna Sophia, Edith Rosa, the minor children of the testator; (3) William James Dunbar Moodie, Donald Hugh Menzies Moodie, Caroline Maria Mackenzie Wylde Brown, Edith Jessie Georgina Moodie, George B. Dunbar Moodie, Alexander Moodie, Alan Moodie, Francis James Green, Charles Bernard Green, Mary Porter Stewart, brothers, sisters, nephews, and nieces of the testator; Henry Hubert Juta, in his capacity as *curator ad litem* of Wedderburn and Erland Moodie, minor children of Duncan Campbell Francis Moodie, who died before the testator.

2. The late George Pigot Moodie died on the 2nd November, 1891, leaving a will, duly executed on 24th June, 1889, of which will plaintiffs annex a printed copy and pray that the said copy may be considered as forming part of this case.

3. In terms of the said will the testator bequeathed to his wife, the said Rosa Maria Pigot Moodie:

(a) A sum of £1,000, to be paid one month after his death for her immediate requirements.

(b) A further sum of £10,000.

(c) All his plate, linen, china, glass, books, pictures, prints, wines, liquors, furniture, and household effects, and also all his carriages, harness, and horses.

(d) The use and enjoyment during her lifetime of his landed property at Rendeboosch, being the estate called Westbrook, with adjoining land, portion of Kleinschoor, and any other adjoining or adjacent land which the testator might be possessed of, also his seaside residence near Simon's Town, called Rocklands.

(e) The interest or other income during her lifetime of a sum of £70,000, under express provision that at her death the said sum should fall into and form part of the testator's residuary estate.

4. The testator bequeathed to his son George Frederick Arthur Pigot Moodie, or to his eldest son surviving at the death of his wife;

(a) The landed property mentioned in paragraph 8 sub-section (d).

(b) The sum of £40,000 if and when he should attain the age of twenty-one years.

5. To each of his children other than the eldest son as aforesaid the testator bequeathed the sum of £20,000, in the case of sons on their attaining the age of twenty-one years, and in the case of daughters on their attaining that age or marrying previously with the consent of their mother or guardians as the case might be.

6. The testator bequeathed to his brothers and sisters and to certain of his nephews and nieces the following sums:

(a) To his brother William James Dunbar Moodie and to his sister Edith Jessie G. Moodie the sum of £8,000 each.

(b) To his brother Donald Hugh Menzies Moodie and to his sister Caroline Maria Mackenzie Wyld-Brown the sum of £5,000 each.

(c) To his brother Duncan Campbell Francis Moodie the interest or income during his lifetime of a sum of £4,000, subject to conditions not necessary to be here set forth, the said sum of £4,000, subject to the enjoyment of the interest as aforesaid, to be paid to Wedderburn Moodie and Erland Moodie jointly, or to the survivor of them if they or such survivor respectively attain the age of twenty-one years.

(d) To certain ten nephews and nieces named in paragraph 1 of this case the sum of £1,000 each.

7. The testator bequeathed:

(a) To each of his executors and trustees appointed under the will as a remuneration for their trouble in the execution of the trusts thereof, and in lieu of all customary fees or commissions to which they might respectively be entitled, the sum of £500.

(b) To the Provincial Board of Trustees of the Church of the Province of South Africa the sum of £9,000, to be applied as directed in the said will in manner unnecessary here to set forth.

8. By the fourth clause of the said will the testator specially provided that if at his death his estate should not after payment thereout of his funeral and testamentary expenses and debts and of the legacies bequeathed to his wife as in paragraph 8, sub-sections (a), (b), (c), (d), set forth, to his said son or eldest surviving son as in paragraph 4 set forth, to his executors and trustees, and to the Provincial Board of Trustees of the Church of the Province of South Africa respectively, as in paragraph 7 set forth, and without taking into account the value of the estate Westbrook and lands aforesaid, the seaside residence Rooklands, and the furniture and other articles bequeathed to his wife as above set forth amount to £200,000, then the legacies bequeathed to the testator's said brothers, sisters, nephews, and nieces, respectively, should abate ratably so

that the aggregate amount of such legacies should not exceed three-tenths of the amount of the residue of his estate.

9. The testator further instituted and appointed his children jointly and in equal shares to be sole and universal heirs of all the residue and remainder of his estate, and directed that during the minority of any of his children the interest of any legacy or inheritance of such minor child or so much thereof as may be necessary should be paid to his said wife, and after her death to the lawfully appointed guardian of the minor, such interest to be expended for the maintenance or education of the minor.

10. The testator appointed his said wife to be the guardian of his minor children, and appointed the plaintiffs to be his executors and administrators and trustees of the estate.

11. The estate and effects of the testator after payment of all funeral and testamentary expenses and debts, and without taking into account the value of the estate Westbrook, the seaside residence Rooklands, and the other landed property hereinbefore mentioned, and the furniture and other articles bequeathed to his wife as in paragraph 8, sub-section (c), of this case forth, amount in value to the sum of £160,000 or thereabouts, and the said sum is the only amount available for the payment of the several sums of money bequeathed as legacies by the testator as hereinbefore set forth.

12. The eldest son of the testator, George Frederiek Arthur Pigot-Moodie, in the will referred to, is still living and is of the age of four years.

The plaintiffs contend:

(a) That the legacy of £1,000 to Mrs. Moodie, and the legacies of the estate Westbrook and the other immovable property, and of the furniture and other articles bequeathed to Mrs. Moodie, and the legacy of £1,500 to the executors should be first paid and satisfied.

(b) That the difference between the whole value of the estate (exclusive of the estate Westbrook, the other immovable property, the furniture and other articles bequeathed to Mrs. Moodie), and £61,500 (the sum of the legacies of £11,000 to Mrs. Moodie, £40,000 to the eldest son, £1,500 to the executors, and £9,000 to the Church of the Province of South Africa), should be ascertained.

(c) That three-tenths of the sum so ascertained should be taken to represent the total amount of the legacies to the brothers and sisters, nephews and nieces, instead of £80,000.

(d) That the legacies to the brothers and sisters, nephews and nieces, proportionately reduced as above, should rank concurrently with all the other legacies mentioned in the will, save and except those referred to in (a).

The defendant, the Hon. James Rose-Innes, jun., as curator for the minor children contends:

1. That the bequest of the estate Westbrook and the other immoveable property mentioned in the will, and of the furniture and other articles mentioned in section 8, sub-section (e), should be carried into effect.

2. That the legacies specially referred to in section 8 of this case, and in section 4 of the will, and amounting in all to the sum of £61,500, should be paid in full.

3. That the legacies of £20,000 to each of the three younger children aforesaid should also be paid in full.

4. That three-tenths of the residue remaining over after payment of all the legacies aforesaid should be distributed among the brothers and sisters of the testator in the proportion of their respective legacies.

5. That seven-tenths of the said residue should be set aside for the life use of Mrs. Pigot Moodie, and should after her death be equally divided among all the children of the testator.

The defendants William James Dunbar Moodie, Donald Hugh Mensies Moodie, Caroline Maria Mackenzie Wyld-Brown, Edith Jessie Georgina Moodie, George Dunbar Moodie, Alexander Moodie, Allan Moodie, Francis James Green, Charles Bernard Greene, Mary Porter Steward, and the defendants Wedderburn Moodie and Erland Moodie, represented by Henry Hubert Juta, *their curators ad litem*, contend:

(a) That the amount of the legacies bequeathed to the brothers and sisters, nephews and nieces, after being ascertained as contended for by the plaintiffs in their contentions (b) and (c), is payable in full, and is not subject to any further reduction or abatement.

(b) That if the said amount of the said legacies bequeathed to the brothers and sisters, nephews and nieces, so ascertained as aforesaid, is not payable in full, the said legacies must rank concurrently with all the legacies mentioned in the will, including the legacy of £1,000 to Mrs. Moodie, save and except the legacy of £1,500 to the executors.

The defendant Rêsa Maria Pigot Moodie admits and agrees to the foregoing contentions of the plaintiffs, but does not admit the contentions of the other defendants as to the construction to be placed on the will of the testator, and she submits herself to the judgment of this honourable court.

All parties agree that the costs of this case should be paid out of the testator's estate; wherefore the parties pray for the judgment on their several contentions, or that this honourable court may be pleased to declare the true intent of the said will and direct the distribution of the available assets.

Counsel having been heard, the Court delivered judgment.

The Chief Justice said: The general rule with regard to the abatement of legacies has been correctly stated, that where there is a deficiency of assets to pay all the legacies, the presumption always is that the testator intended that all the legacies should abate in proportion to the amounts; and the main question to be decided in this case is whether in the 4th clause of the will there is such a clear indication of the testator's intention that there should not be an abatement as to justify the Court in holding that this presumption is rebutted.

The words relied upon to show that no abatement was intended are those in brackets (after payment thereof of my funeral and testamentary expenses and debts, and the aforesaid legacies bequeathed to my said wife, to my said son or eldest surviving son, to my executors and trustees, and to the Provincial Board of Trustees of the Church of the Province of South Africa respectively, and without taking into account the value of the estate Westbrooke, and lands aforesaid, the seaside residence Rocklands, and the furniture and other articles bequeathed to my said wife.)

Certainly there is much force in the argument that the use of the word payment and the juxtaposition of the words debts and legacies intended to show that the testator meant that there should be an actual payment.

On the other hand it appears to me that the testator's intention was not pointedly directed to the particular question of abatement, but that the object of the clause was to provide what the legacies should be to the brothers, sisters, nephews and nieces in case the estate did not reach a certain amount.

Upon the whole I have come to the conclusion that this clause in brackets is not sufficient to rebut the presumption in favour of an abatement of the legacies, for when the testator used the word payment he simply meant "after deducting." It was after deducting these amounts that the proportionate share given to the brothers, sisters, nephews and nieces was to be ascertained.

I fully understand the argument that there was to be no abatement as regards the amounts of the four legacies, but I cannot understand this argument as far as the three children are concerned.

Then it is contended that because an abatement is provided for the testator could not have intended an abatement to apply to his children. In my opinion the word abate was not used technically, but was used in a mere colloquial sense. What the testator intended was that there should be a deduction, that the amount given to the collateral relations should be reduced, but once having made that deduction there was still to be a further abatement with the legacies given to the other legatees.

Upon the whole, I have come to the conclusion that the contention of the plaintiffs must be sustained.

I agree with Mr. Juta that there is no reason why the £1,000 to Mrs. Moodie should not abate with the other legacies.

The decision of the Court therefore is in favour of the plaintiffs' contention with the exception of the £1,000 to Mrs. Moodie, which must be struck out. As to costs, seeing that all parties have agreed that they should be paid out of the estate an order to that effect will be made.

Mr. Justice Buchanan, in concurring, said: My opinion is that the fourth clause was inserted only for the purpose of ascertaining the amount to be given to the collaterals. I cannot read the clause as giving a preference to any of the legacies except those given to the testator's children. I think it highly equitable to say that all the legacies are to abate in proportion to carry out the estate in the exact proportion which the testator himself laid down.

[Attorneys for the Plaintiffs, Messrs. Scanlen and Syfret; Attorneys for Mrs. Moodie and Heirs, Messrs. Fairbridge & Arderne; Attorneys for the legatees, Messrs. C. and J. Buissinne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 30th May,
K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. 1892.
Justice UPINGTON, K.C.M.G.}]

IN RE REGINA V. LOTTERING AND AFRICA.

Mr. Justice Buchanan mentioned this case, which had come on review from the Resident Magistrate of Prince Albert.

The prisoners were charged with contravening section 18 of Act 28 of 1888. They were found guilty, and sentenced each to three months' imprisonment with hard labour and twelve lashes.

His Lordship said that Lottering being an unconvicted prisoner, was not chargeable under section 18.

Under section 28, however, he could have been sentenced to imprisonment or lashes but not to both.

Consequently in Lottering's case the lashes would be struck out.

NESBITT V. NESBITT.

On the motion of Mr. Webber, the Court granted the application for removal of this case to the Circuit Court, Aljwal North, for trial.

JEFFREY V. JEFFREY.

Mr. Tredgold moved for judgment in terms of the consent paper put in.

Judgment was given accordingly.

DE WET V. JOOSTE.

{ 1892.
30th May.

Resident Magistrate — Jurisdiction — Exceptions—Title to land in dispute—Rights in future—Contract—Lease for a year—Rent payable monthly—Act 20 of 1856, Sections 8 and 10—Resident Magistrate's decision affirmed on appeal.

Mr. Searle appeared for the appellant, and Mr. Schreiner, Q.C., for the respondent.

This was an appeal from a judgment of the Resident Magistrate of Worcester in an action in which the defendant (present appellant) was sued for £5 10s., being two months' rent of certain premises situate at Worcester, and leased by the respondent to the appellant for a term of one year at a monthly rent of £2 15s.

At the hearing of the case the following exceptions were raised on behalf of the defendant:

1. That the summons disclosed no cause of action inasmuch as there was no allegation therein that the house and premises for which rent was claimed belonged to the plaintiff, nor that she had a right thereto, and as being vague inasmuch as there was no allegation whether it had been a verbal or a written agreement to let and hire.

(This exception was overruled, and on the Court's suggestion the summons was amended by adding the word "verbal" before agreement.)

2. Defendant excepted to the jurisdiction of the Court, as from the summons it appeared that the plaintiff alleged that the defendant had hired the house and premises for a period of twelve months at a rental of £2 15s. per month, or in all defendant incurring, as plaintiff alleged, a total liability of £38 to her, whereof the plaintiff now sued for £5 10s., so that if the Court were to decide on the merits of the case it would in reality be adjudicating upon an amount beyond its jurisdiction, viz., £38, and would be binding rights in future. The defendant further excepted to the jurisdiction inasmuch as he denied that the house and premises belonged to the plaintiff, or that she had any right thereto, but said that they belonged to, and were the lawful property of, J. P. de Wet, of Worcester, and that thus the title to land or tenements being in dispute, and rights in future being involved, the Court had no jurisdiction.

(The first part of this exception was overruled and the second part reserved until evidence had been gone into).

The plaintiff's agent maintained that the defendant could not possibly except to the plaintiff's title, that the exception was bad in law, and no defence.

The defendant's attorney tendered the evidence of J. P. de Wet and of the defendant, to show that the ground belonged to J. P. de Wet, and that the plaintiff had no right thereto, and that the two months' rent now sued for had been duly paid by the defendant to the aforesaid J. P. de Wet.

The plaintiff's agent objected to such evidence being taken on the ground that there was no allegation that the defendant, the tenant, had been judicially disturbed in his occupation by any third party, and also that a tenant could not challenge his landlord's title.

The second part of the exception was overruled.

The defendant's attorney pleaded the general issue.

After hearing the evidence, in the course of which the Court refused to allow defendant's attorney to cross-examine plaintiff as to the ownership of the property, judgment was given for plaintiff as prayed with costs.

The following were the Magistrate's reasons:

The defendant's attorney took two exceptions to the summons, but the second might be more conveniently divided into two, so as to treat the whole as three exceptions. The first exception I did not consider of any importance, but suggested that the summons should be slightly amended in terms of section 50, Act 20 of 1856.

As to the second exception, it appeared to me that it cannot be said that by a decision of this action rights in future will be bound. The verbal contract of letting and hire is for one year, but the stipulation is for the payment of a monthly rental at a specified sum per month, and no part of the rent of the whole term can be claimed or brought in question, excepting such rent as has fallen due for an expired period of a month or months.

That it was not the intention of the Legislature to limit the jurisdiction of the Resident Magistrate's Court in cases of rent to the defendant's interest to the extent of £20 only in the property let is, I think, apparent from the analogy of section 10 of the Act. This section provides for actions of ejectment, which are of more importance than those for rent, and enacts that provided the defendant cannot show that his right of occupation is of the clear value to him of £40, the plaintiffs may bring such action. In the present case the defendant's right of occupation cannot be said to be worth more to him than £88.

The third exception attempts to raise the question of ownership of the property let. It avers that the property belongs to a third party, but not that the defendant has any interest in the question of ownership, or that the plaintiff may not have some other right of letting the property besides ownership.

By section 10, already quoted, the *bona-fide* occupier of land may sue the tenant who holds under him in an action for ejectment, and so it would seem he could also sue for arrear rent, and since the interests that may be acquired in landed property are of a diversified and often of a complicated nature, it would afford a tenant a ready means of evading or indefinitely postponing the enforcement of his just obligations if he were allowed lightly to question his landlord's title.

Roscoe's Digest of the Law of Evidence, on Occupation and Use, p. 814, appears to me to meet this exception.

The plaintiff having proved the allegations contained in the summons, and the defendant having made no attempt to rebut them, judgment went for plaintiff with costs.

Mr. Searle was heard in support of the appeal, and referred to "Koller v. Abas," 1 C.T.L.R., 200; "Wienand v. Goldschmidt," 5 E.D.C., 267; Act 20 of 1856, sections 8 and 10; "Taylor v. Haupt," 5 Juta, 22; and "Ghislin v. Syster," Buch., 1874, p. 57.

Mr. Schreiner contended that "Keller v. Abas" had no application, as the title to the property was not in dispute. Counsel referred to Voet 19, 2, 82; Act 20 of 1856, section 10; "Kinnard v. Hirsch," 6 Juta, 828; and "Riversdale Divisional Council v. Pienaar," 8 Juta, 252.

The Chief Justice, in delivering the judgment of the Court, said: The summons in the Court below was for £5 10s., for the rent of certain premises alleged to be due by the defendant to the plaintiff. The summons alleges that the defendant entered into the said premises under an agreement, and that he occupied and still occupies the same but refuses to pay the rent therefor.

The summons alleges that on or about the 23rd day of January, 1892, the plaintiff agreed to let to the defendant, and the defendant agreed to hire from her for the term of one year beginning on the 15th day of February, 1892, a certain house and premises.

The plaintiff having been sworn, says: "I reside at Hex River East. I am the plaintiff in this case. I know the defendant. On the 23rd January I agreed to let to the defendant, and he agreed to hire from me for the term of one year, certain premises in the town of Worcester at a monthly rental of £2 15s. payable monthly.

The plaintiff has let the premises to the defendant. The defendant therefore is bound by his contract to pay the rent to the person who let the premises to him.

The first exception of importance taken to the summons is to the effect that the property virtually belongs to another person, one J. P. de Wet, of Worcester, and that thus the title to land is in dispute, and rights in future will be bound. In my opinion this exception was invalid, on the

ground that the ownership was not in dispute. The title was not in dispute, because it is agreed that whoever the owner might have been the plaintiff had entered into this contract with the defendant, and it is quite possible that whoever the owner might be the plaintiff might still be entitled to sublet the property.

The only ground upon which the defendant could, in my opinion, successfully defend the action would be if he were in a position to say: "Although the plaintiff let the land I am bound by law to pay the rent to J. P. de Wet, and inasmuch as I cannot be called upon to pay twice, I object to pay any other person."

There is nothing in the summons or plea to the effect that the defendant was bound in law to pay the rent not to the plaintiff but to a third person.

The exception therefore must be overruled. In the case of "Koller v. Abas,"* which has been relied upon there was no allegation that the plaintiff in that case had let to the defendant. The contest between the parties was, who was the owner? The summons relied upon the ownership of the plaintiff as giving him a right to sue. Thereupon the defendant said in effect: "If this is your only title to sue then I can prove that someone else is the owner," and the Magistrate held the title to be in dispute. That case therefore has no application to the present.

Then coming to the second exception; I think that if it had been shown that the defendant really denied that any lease had been entered into it might have been fairly urged that more than £20 was in dispute, but the letting by the plaintiff is admitted, and the only question to decide is whether the two months' rent claimed was due or not.

Now the decision of the Magistrate upon this point could not possibly affect rights in future, nor the question as to the remainder of the lease.

The second exception must therefore be overruled, and the appeal dismissed with costs.

[Appellant's Attorney, C. C. Silberbauer; Respondents' Attorneys, Messrs. Fairbridge & Arderne.]

TWINE V. THE WOODSTOCK MUNI- { 1892.
CIPALITY. { 30th May.

Municipality — Municipal Regulations —
Alleged contravention—Error in summons
—Exceptions—Act 27 of 1887, Section 5 §
12, and Section 23—Appeal—Costs.

Mr. Searle appeared for the appellant, and Mr. Giddy for the Crown.

This was an appeal from a sentence inflicting a fine of 10s. on the appellant, passed by the Assistant Resident Magistrate of Cape Town at the Periodical Court held at Woodstock.

The appellant was charged with contravening section 5, sub-section 12, of the Municipal Regulations of Woodstock by wilfully breaking up and injuring a culvert in the Municipality.

The defendant's attorney excepted to the charge on the following grounds:

1. That the defendant should have been charged under the common law with malicious injury to property, or

2. With a specific contravention of Act 27 of 1882, and not as in the summons.

3. That section 5 of the Municipal Regulations did not apply. The Assistant Resident Magistrate overruled these exceptions, and tried the defendant on the summons as it stood.

It appears that section 5 of the Municipal Regulations refers to the establishment of gunpowder magazines, and has no reference to the destruction of property, nor has that section a sub-section, so that the section alleged to have been contravened and the offence alleged to have been committed do not correspond.

Mr. Searle, in support of the appeal, directed the attention of the Court to section 5 of the Municipal Regulations, which empowers the Council to establish a powder magazine within the Municipality, but has no connection with the offence charged. It was probably intended to charge the defendant with the Police Offences Act 27 of 1882, section 5, sub-section 12 of which refers to wilfully or neglectfully breaking up, injuring, or damaging any dam or public watercourse or sluiceway, or any public street, footpath, carriage road, or thoroughfare. Section 23 of the Act says that in any prosecution for any offence under the provisions of this Act it shall be sufficient to set forth the offence charged in the words of this Act. This was not done. "Culverts" are not mentioned. In a criminal case the section must be strictly followed.

Mr. Giddy, in support of the conviction, contended that the defendant had not been prejudiced by the error in the summons, and urged that the conviction should be upheld.

The Chief Justice, in giving judgment, said the 23rd section of the Act 27 of 1882 provides that, in any prosecution under the provisions of that Act, it shall be sufficient to set forth the offence charged in the words of the Act. I should not go so far as to say that the identical words must be used, but this I do think, that the words having substantially the same meaning ought to be inserted in the summons.

What are the words of the summons?—"Wilfully breaking up a culvert by the Dutch Reformed Church, Church-street."

The Act mentions a dam, public watercourse, sluice gate, public street, footway, or thoroughfare.

In this case the accused was not charged with injuring a dam, sluice gates, or footway, and the only word under which the offence can be said to come as the words "public watercourse."

The question is whether a culvert is necessarily a public watercourse? It was quite consistent with the form of the summons that the culvert may have been a private one belonging to the Dutch Reformed Church, but there is no charge against the prisoner of having committed any of the acts which are punishable under the statute.

The Magistrate erred in sentencing the appellant upon a summons drawn in its present form.

The appeal must therefore be allowed.

Mr. Searle asked for costs against the Municipality, and referred to "Tregidga & Co. v. The Rondebosch Municipality," 6 Juta, 821, and "Oudtshoorn Municipality v. Wiggett," 6 Juta, 128.

The Chief Justice said that in all cases the question of costs was left to the discretion of the Court. He thought the Court should not discourage Municipalities, even if unsuccessful, by making them pay the costs in a case like this. They had, it appeared, acted *bona fide*, and while there was a mistake in the summons yet it was a risky thing for the accused to meddle with culvert in the way he did. The Court would therefore make no order as to costs.

[Appellants' Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] June 2nd, 1892.

PROVISIONAL ROLL.

COHEN'S TRUSTEES V. COHEN.

On the motion of Mr. Graham, the Court decreed the final adjudication of the defendant's estate.

ISAAC V. CONROY.

On the motion of Mr. Watermeyer, the Court granted judgment for £782 14s. 6d., being balance due on a mortgage bond for £790, and further declared the property to be executable.

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VAN EYL V. STONE.

On the motion of Mr. Shell, the Court granted provisional sentence on a mortgage bond for £5,800 with interest, and declared the property executable.

CARDINAL V. FORRESTER.

On the motion of Mr. Shell, the Court decreed the final adjudication of the defendant's estate.

BEIT V. EYERSBACH.

On the motion of Mr. Schreiner, Q.C., the Court granted judgment in terms of the declaration for £295 16s., with interest *a tempore moras*.

IN RE TRUTER.

On the application of Mr. Tredgold, Mr. Casparius Johannes Truter was admitted as a translator in English and Dutch.

GENERAL MOTIONS.

IN RE INSOLVENT ESTATE OF ABRAHAM COHEN.

On the motion of Mr. Graham, the Court appointed Mr. Nash a provisional trustee to take charge of the assets of the estate, with power to carry on the business until a permanent trustee was appointed.

IN RE MATTER OF EVERT J. GROBBELAAR.

On the motion of Mr. Juta, the Court appointed Mr. Maskew *curator ad litem* to represent the said Grobbelaar, alleged to be a lunatic, in proceedings about to be instituted to have him declared of unsound mind, and incapable of managing his affairs.

IN RE MOSSEL BAY MUNICIPALITY { 1892. V. WIGGETT. { 2nd June.

Notice of appeal—Act 21 of 1876, section 4—
Non-compliance with terms of section—
Refusal of Magistrate to transmit record.

Notice of appeal must be given in writing within four days of conviction to satisfy the requirements of Act 21 of 1876, section 4.

Verbal notice of intention to appeal is not sufficient, although the Magistrate may have made a note on the record that an appeal had been noted.

Mr. Graham appeared for the applicant, and Mr. Schreiner, Q.C., for the respondent.

This was an application by the defendant for an order requiring the Resident Magistrate for the district of Mossel Bay to forward the record of the proceedings in the suit between the parties for the purpose of appeal from the Magistrate's decision.

It appeared from the affidavit of defendant's attorney that one Matthew Wiggett, a butcher, of Mossel Bay, was summoned on the 28th March, 1892, for contravening sub-section 5 of paragraph 7 of the Municipal Regulations, by allowing certain pigs to run at large on the town commonage.

Wiggett was found guilty and sentenced to pay a fine of 10s., which fine was paid.

After sentence had been passed Wiggett instructed his attorney to give notice of appeal to the Supreme Court.

The attorney, before payment of the fine, informed the Resident Magistrate that his client wished an appeal to be noted, and requested the Magistrate to accept notice thereof, which, the attorney alleged, the Magistrate consented to do, and which was forthwith entered upon the records of the case thus, "Noted appeal.—J.S.E."

That about six days afterwards the Magistrate verbally informed the attorney that notice of appeal had not been given in terms of section 4 of Act 21 of 1876, whereupon the attorney protested that notice had been given and accepted in open court on the day of the trial, the 28th March, 1892.

On the 21st April the attorney notified to the Magistrate that the appeal would be heard as early as possible in order that the records might be transmitted to Cape Town.

Certain correspondence then passed between of Magistrate and the attorney, and on the 27th of April the latter wrote again to the Magistrate for a definite reply as to his intention of transmitting the records, and received a reply stating that the records would not be transmitted. In consequence of the action of the Magistrate no further proceedings could be taken with regard to the appeal.

The Magistrate, in his answering affidavit to the above, admitted that the attorney had informed him that it was his client's intention to appeal, and that he (the Magistrate) had made the note on the records above referred to. The Magistrate denied, however, that he agreed to accept such statement as a formal notice of appeal, and further said that it frequently happened that such statements were made, but that he never treated them, nor accepted them, as formal notices of appeal. The Magistrate further stated that the conversation referred to in the attorney's affidavit took place ten days after the hearing of the case, and not six days after, as alleged; and finally, that Wiggett had neither personally, nor through

an agent, given the notice required by section 4 of Act 21 of 1876 to the clerk of the Court.

Mr. Graham, in support of the application, remarked that the attorney had not observed the strict terms of the section, but that substantially he had done so.

The Chief Justice: Did the Magistrate waive the duty of giving notice, in writing, by the note which he made on the record, "Appeal noted"?

Mr. Graham referred to Brandford's case.

The Chief Justice: In that case a point had been reserved.

Mr. Schreiner contended that the Magistrate could not waive the duty of giving notice in writing as required by the section. The note made by the Magistrate on the record was a purely formal note which a Magistrate would make under the circumstances, but could not be construed as an acceptance of notice to appeal.

The Chief Justice, in giving judgment, said he could quite understand, as the Magistrate said, that smarting at the fact that they had lost their case, agents often got up and gave notice of appeal, without having any real intention of doing so. In the present case the Magistrate seemed to assume that that was the intention, and it would have been better for him not to have written on the record the words "Appeal noted," but although he wrote these words he might have supposed that within the time specified by law due notice would be given in writing. That notice was not given. If it had been a case where the Crown was concerned only, and an important question was at issue, no doubt the Attorney-General would have consented to the case being appealed from, notwithstanding the expiry of the time specified for giving notice, but in the present case they had to do with the Municipality of Mossel Bay, which had received no notice of this application. The law required that notice in writing should be given in cases of appeal. In the absence of such notice in this case, the application must be refused with costs.

Their lordships concurred.

[Applicant's Attorney, D. Tennant, jr.]

IN RE PETITION OF ISABELLA HOFMEYER.

Mr. Molteno moved for leave to raise a loan on mortgage of a piece of landed property situated in the Cape division, for the purpose of completing the buildings thereon, without the assistance of petitioner's husband, who has left her, and of whose present address she is unaware.

The Court granted the application.

The Chief Justice observed that the husband could not be prejudiced, as the property was situated in the Colony, and the money about to be raised would be expended on the property.

IN RE PETITION OF JAN PAUL OERTZEE.

Mr. Tredgold moved for leave to petitioner, as trustee under the ante-nuptial contract of Edward Meyers and Ann M. Williamson, to conclude a sale of certain trust property, situated in Griqua Town, ceded for the benefit of the said Williamson and the children of the marriage.

The Court granted the application, the purchase money to be invested on first mortgage of landed property.

IN RE PETITION OF LUDWIG WETZEL.

Mr. McLauchlan moved for a rule nisi requiring petitioner's wife to show cause why he should not be admitted to sue her *in forma pauperis* in an action for divorce by reason of her adultery, which the Court granted.

PETERS V. PETERS.

Mr. McLauchlan appeared for plaintiff; the defendant in default. This was an action for divorce on the ground of adultery on the part of the plaintiff's wife. The plaintiff stated that he had only lived with his wife for two weeks when she left him. He afterwards found her living with another man.

Further evidence of the adultery having been given, the Court granted a decree of divorce.

LE ROUX V. NEETHLING. { 1892.
2nd June.

Illegitimate child—Paternity—Action for maintenance—Plaintiff's evidence not corroborated in material particulars—Resident Magistrate's judgment affirmed on appeal.

Mr. Graham appeared for the appellant (plaintiff in the Court below), and Mr. Juta for the respondent.

This was an appeal from the judgment, in favour of the defendant, of the Resident Magistrate of Worcester in a case in which the defendant was summoned for £6 10s., being for maintenance of plaintiff's illegitimate child, of which she alleged defendant was the father.

The evidence, part of which was taken on interrogatories, was of a very conflicting character.

The Magistrate stated in his reasons, *inter alia*, that some circumstances in the case suggested considerable doubt about the defendant's innocence, yet that they did not, in his opinion, amount to conclusive evidence against him in the face of the difficulties which the plaintiff's own evidence had raised. And that added to this was the further

circumstance that the plaintiff's own evidence generally had not been corroborated in some material particular by other independent evidence.

Mr. Graham, for the appellant, remarked that the appeal was not brought merely on a question of fact. It was brought partly on a question of law, and partly on certain inferences to be deducted from the facts. Counsel reviewed the evidence at length, and on the question of the medical testimony referred to Tidy on Medical Jurisprudence, and to the following authorities: "Gleeson v. Durrheim," Buch. 1868, p. 244; "Crowe v. D.," 4 Searle, 227; and "Botma v. Retief," Buch. 1876, p. 120.

Mr. Juta was not called upon.

The Chief Justice, in giving judgment, said it was impossible to lay down any general rule as to what degree of evidence was required to fix a person with the paternity of a child. The Dutch authorities had attempted to lay down rules as to the degree of corroboration required to support the plaintiff's evidence, and as to the circumstances under which the denial must be taken of the alleged father. But he (the Chief Justice) thought it might be laid down generally in a case of this kind that the plaintiff who tried to fix the paternity of a child on a man must clearly prove it, and must be corroborated by some independent testimony, and in case of doubt the benefit should be given for the defendant. That he took to be the general effect of the authorities. There were certain weak points in the defendant's case, but these weak points were present in the mind of the Magistrate, and he seemed fully to have considered them. One of these weak points was that the defendant denied having paid the doctor, but he (the Chief Justice) did not think that denial proved much, because he might be mistaken, and there would be no reason for the denial, inasmuch as he admitted taking the plaintiff to the doctor to see if she was pregnant. But a still weaker point in the defendant's case was the extraordinary letter which he wrote to the father of the girl, but that letter might also be explained by the indignation of the defendant at being charged with being the father of the child. On the other hand, the plaintiff's own evidence was weaker than the defendant's. His lordship then referred to various acts of the plaintiff showing these weak points, and said that as it was a question for the Magistrate to decide, and he came to the conclusion that the plaintiff could not be believed, and that the defendant must be believed, he (the Chief Justice) did not think the Court could disturb the Magistrate's judgment, and must therefore dismiss the appeal with costs.

[Appellants' Attorney, C. C. Silberbauer; Respondent's Attorneys, Messrs. Fairbridge & Ardena.]

VAN REENEN V. MANUEL. { 1892.
2nd June.

Evidence — Credibility — Resident Magistrate's judgment affirmed on appeal.

Mr. Juta appeared for the appellant, and Mr. Molteno for the respondent.

This was an appeal from the judgment of the Resident Magistrate of Cape Town, given in favour of the plaintiff (present respondent), in an action in which the defendant was sued for £7 17s. 6d., in respect of the sale of a table and ladder, being the amount alleged to be due by defendant to plaintiff.

The defendant denied liability, and swore that she had already paid the money. Her evidence on this point was corroborated by that of another witness and by her son, who swore that he heard his mother ask the plaintiff for a receipt. It appeared from the evidence that the appellant had bought a house for £1,600 and £80 worth of furniture from the respondent, but the items on which she was now sued had not been included in the last-mentioned purchase.

The Magistrate's reasons were as follows: The defence in this case was payment, and I found as a fact, after hearing the witnesses, that judgment should be for the plaintiff. The impression left on my mind after hearing the witnesses was that the plaintiff was telling the truth, the others must have been mistaken.

Mr. Juta, in support of the appeal, contended that the judgment was against the weight of evidence and wrong. The defendant's evidence had been corroborated by one independent witness, and should have been believed, otherwise the Magistrate should have found that perjury had been committed.

The Chief Justice, in giving judgment, said he was not prepared to lay down as a general principle that under no circumstances would the Court reverse the decision of a Magistrate upon a pure question of fact. The preponderance of evidence might be so entirely on one side, and there might be circumstances in the case showing that the credibilities were all on the one side, so as to quite justify the Court in deciding adversely to the opinion of the Magistrate, but then the preponderance must be very great. The question in this case was whether the preponderance was so much in favour of the defendant as to justify the Court in reversing the decision of the Magistrate. To his (the Chief Justice's) mind it was an extremely doubtful case. It seemed so unreasonable to suppose that Mrs. Van Reenen, having paid this large sum of money for the

house and £80 for the furniture, would state on oath that she also paid for this table, and produce witnesses falsely to swear that they saw her. He thought the Magistrate must have come to the conclusion that these witnesses did falsely swear. He said they were mistaken, but he said also that he believed Mrs. Manuel, and the clear inference was that he disbelieved Mrs. Van Reenen. He (the Chief Justice) therefore thought the Court would not be justified in altering the Magistrate's decision. Mrs. Van Reenen was to blame for not taking a receipt at the time. She attached great weight to the possession of a receipt, because she went the length of getting an attorney afterwards to write a letter of demand for one. The appeal would be dismissed with costs.

[Appellant's Attorney, W. E. Moore; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT

[Before Sir J. H. DE VILLIERS, { 7th June
K.C.M.G. (Chief Justice), and { 1892.
Mr. Justice BUCHANAN.]

TULBAGH MUNICIPALITY AND OTHERS V. MORREES.

Water — Watercourse — Interference with rights of lower riparian proprietors — Prescription — Declaration of rights — Perpetual Interdict.

Mr. Searle and Mr. Graham appeared for the plaintiffs, and Mr. Schreiner, Q.C., and Mr. Molteno for the defendant.

This was an action instituted by the Commissioners for the Municipality of Tulbagh and the minister and churchwardens for the time being of the Dutch Reformed Church at Tulbagh against Adriaan Morrees for a declaration of rights, for a perpetual interdict, and for damages. The declaration was as follows:

1. The Municipality of Tulbagh has been established under the provisions of Ordinance No. 9 of 1886, and the first-named plaintiffs, the Commissioners for the said Municipality, are vested with all the rights and powers conferred by the said Ordinance. The second-named plaintiffs are the registered owners of immovable property situate within the said Municipality and contiguous to a watercourse or watercourses hereinafter more

specifically referred to. The defendant is the registered owner of the farm Kruisvallei adjoining the limits of the said Municipality.

2. For a period much longer than the legal period of prescription a perennial stream of water has flowed in a defined channel from the Witsenberg Mountain above the said farm Kruisvallei, through and past that farm to the village and Municipality of Tulbagh.

3. The water in the last paragraph mentioned has flowed and flows in a watercourse or watercourses vested by law in the said first-mentioned plaintiffs, and it has for the said period stated in the said last paragraph, formed wholly or mainly the water supply of the said Municipality, and has been enjoyed and used by the erf-holders and inhabitants generally of the said Municipality for domestic and other purposes as well as for irrigation.

4. Among the landed proprietors within the said Municipality, who are riparian proprietors entitled to enjoy and use the said water, are the second-named plaintiffs.

5. The defendant, as a riparian proprietor, has wrongfully and unlawfully made an unreasonable use of the said water upon his said farm, and has wrongfully and unlawfully diverted the original course of the said stream of water, and he has constructed a deep trench upon his said farm for the purpose, and with the effect, of further diminishing the water supply to which the said Municipality and the plaintiffs are entitled, and he has wrongfully and unlawfully fouled and polluted the said water flowing over his said farm. The defendant further threatens and intends to continue his wrongful acts as aforesaid.

6. By reason of the premises, the rights of the plaintiffs have been infringed upon, and they have suffered damage in the sum of £100. The plaintiffs pray as follows:

(a) That the right of the inhabitants of the Municipality of Tulbagh and the plaintiffs to the use of the said water may be declared by order of this honourable Court, and that it be adjudged that the defendant has, as a riparian proprietor, made an unreasonable use of the said water, and has interfered with the plaintiffs' rights as lower riparian proprietors.

(b) That the defendant be restrained by perpetual interdict from making such unreasonable use of the said water, and from fouling and polluting the same.

(c) That the defendant be compelled to pay to the plaintiffs the sum of £100, as and for damages as aforesaid.

(d) That the plaintiffs may have such further or other relief as may seem meet, with costs of suit.

Or in the alternative the plaintiffs say as follows: 7. They beg leave to refer to the allegations in the first count of the declaration contained.

8. They say that irrespective of their riparian rights, if any, the defendant has wrongfully and unlawfully interfered with rights acquired by them by prescription to the water in the said watercourse or watercourses.

9. They crave leave to refer to the statements set forth in paragraphs 2, 3, and 4 of the declaration, and say that by reason thereof they have acquired the rights to use a reasonable share of the water in the said watercourse or watercourses running over defendant's farm.

10. The defendant has interfered with the prescriptive rights of the plaintiffs aforementioned by the unlawful and wrongful acts of diversion and pollution, in paragraph 5 of the declaration set forth, to which the plaintiffs crave leave to refer, and the plaintiffs have thereby sustained damage in the sum of £100.

The plaintiffs pray as follows:

(a) That the rights of the inhabitants of the Municipality of Tulbagh and the plaintiffs to the use of the said water may be declared by order of this honourable Court, and that it be adjudged that the defendant has interfered with the plaintiffs' rights to the use of the said water acquired by prescription as aforesaid.

(b) That the defendant be restrained by perpetual interdict from interfering with the said rights by diverting the said water or by polluting the same.

(c) That the defendant be condemned to pay to the plaintiffs the sum of £100 as and for damages.

(d) That they may have such further or other relief as may seem meet, with costs of suit.

The defendant in his plea admitted the allegations contained in paragraphs 1 and 3 of the declaration, save that he said that the watercourse referred to in paragraph 3 was by law vested in the first-named plaintiffs only in so far as it was situated within the limits of the Municipality. As to paragraph 2, he denied that the water of the stream referred to had flowed throughout the period referred to in the same channel, but otherwise he admitted the allegations in the said paragraph. As to paragraph 4, he admitted that the second-named plaintiffs were landed proprietors within the Municipality of Tulbagh, and that an erf vested in them adjoined the watercourse through the village, but he alleged that he had no knowledge of their particular title to the use of water therefrom, and begged to refer the Court to such proof as they might adduce of their title to such water.

The defendant specially pleaded that as registered proprietor of the remaining extent of the farm Kruisvallei he was entitled to the free use of two-thirds of the water of the stream referred to in the declaration, the right to which proportion of the said water had been for a period of thirty years and upwards claimed

and enjoyed as of right by him and his predecessors in title adversely to the plaintiffs and their predecessors in office and title, and that such proportion of two-thirds of the said water had by common consent of the riparian proprietors below Krusivallei throughout the said period been recognised as was in fact the reasonable share to which he and his predecessors in title had been entitled. He denied that he had ever used an unreasonable share of the said water, or any share exceeding two-thirds thereof, but had always been and was ready and willing to allow the full proportion of one-third of the said water to flow down below his said farm for the use of the lower proprietors on the course of the said stream. He admitted that he had recently constructed a trench on his farm for the purpose of making lawful use of the water to which he was entitled, but he denied specifically that the said trench had been constructed for the purpose, or that it had had the effect of diminishing or taking away any of the water to which any lower proprietor was entitled. He said that he had upon part of his own property made and provided at his own expense a course for the water of the said stream where a new course was absolutely necessary, but that the said new course was shorter than the old, and conveyed the water with less loss to a point still in his own property, where the water was returned to the old course, and flowed down not diminished by his operations in any way in volume for the use of the lower proprietors on the said stream, who had been benefited by his operations. He specially denied that the first-named plaintiffs were entitled to maintain this action as lower riparian proprietors on the said stream, or that either they or the second-named plaintiffs had acquired any prescriptive right as against the defendant or his predecessors in title in respect of the water of the said stream.

Wherefore he prayed that the plaintiffs' claim might be dismissed with costs.

The plaintiffs, in their replication, denied that the defendant was entitled, as against the lower proprietors on the said stream, to two-thirds of the said water, or that they had ever consented to his using the said two-thirds, or that the said share had been recognised for thirty years and upwards as the reasonable share of the defendant and his predecessors in title. They alleged that the defendant had on divers occasions used the whole of the said water, and had claimed the right to divert the whole, and to deprive the lower proprietors of the use of the same. They denied that the defendant had any right to divert the course of the said water, and said that they had never been consulted as to the said diversion; that a considerable amount of water had been lost to them by the diversion complained of, and that

they had not been benefited thereby; on the contrary, they alleged that they had sustained loss and damage thereby.

The defendant in his rejoinder specially said, *inter alia*, that in times of scarcity of water he had not used more even of the two-thirds of the water that was required for domestic purposes, the watering of stock, and the irrigation of his plantations, but had permitted the remainder of the said two-thirds of the water to flow down for the benefit of the lower riparian proprietors. He denied all the allegations of fact and conclusions of law in the replication save those that had been admitted. Upon these pleadings issue was joined.

Mr. De Klerk (a lower riparian owner) was on Friday last allowed to intervene as a co-plaintiff, and to-day, on the application of his counsel (Mr. Juta), he was permitted to withdraw.

Mr. P. J. P. Marais (chairman of the Municipality of Tulbagh), examined by Mr. Searle, stated that he was born in Tulbagh but was absent from the village from 1874 to 1884, consequently he could not say what took place in 1881. He became one of the Commissioners five years ago. In 1886 he remembered difficulties arising with the then owner of Krusivallei with regard to the water. In 1888 the defendant purchased the farm. In June, 1889, defendant wrote asking that a special meeting be held concerning a proposal he had to make regarding an alteration to the water-furrow. After some correspondence, it having been reported to the Municipality that defendant had diverted the course of the stream, an inspection was made, when it was found that from the upper point defendant had made a deep excavation in the side of the hill, turning the water against the embankment. He had also placed a 9-inch earthenware pipe in the furrow. The Commissioners told defendant that the pipe would not answer, as it would become blocked up, and the village would be deprived of water. They subsequently gave him notice to remove the obstructions, or stand the consequences. By the diversion a quantity of water was lost in the vley. The old furrow was between three and four feet deep, in some places shaded by grass and bushes. They also found a large log of wood in the old furrow, which caused the water to run into the vley. A trench had also been cut, which affected the flow of the water. It had always been the custom in Tulbagh to allow the water to run twice a day for four hours. The furrow was the only channel from which the water even could be irrigated, and the inhabitants depended wholly upon this stream for their water supply. During the past two or three years there had been great complaints of the scarcity of water. The inhabitants got their drinking water out of the "dipping place," near the Rev. Mr. Buehner's residence. On frequent

occasions latterly he saw the water in a very dirty state, which he attributed to the washing of soiled linen and the wallowing of pigs in the furrow. Impure matter also came from the distillery. Defendant had never lived on the farm himself since he became owner; it was occupied by leasees. One evening the furrow was quite dry, and on investigation it was found that the water had been diverted at Kruisvallei.

Cross-examined: He objected to the pipe because it was liable to be blocked, and it did become blocked, with the result that there was no water in the village. The Municipality never proposed that defendant should move his mill, they paying half the cost. Some people took their water from the furrow, and others from the aqueduct. During the summer months he had noticed the vley to be quite green, caused by absorption of water from the new furrow. None of defendant's land was damaged by the overflow of the old furrow. He did not contend that defendant should not enlarge his cultivated ground, but that he should not interfere with the eight hours of water allowed to the village. There was no agreement with the owner of Straatskerk as to the division of the water. The former owner recognised a division of the water by time when he owned the farm Kruisvallei. He frequently visited the mill, and on those occasions he noticed the pollution of the furrow. The attention of defendant had often been drawn to this, but nothing was done. The water passed over Malherbe's property after leaving Kruisvallei, and then on to the village commonage, where the cattle were allowed to graze. A boy was specially engaged to keep the cattle from fouling the furrow. Sometimes the water in the furrow was diverted for the purpose of irrigating the "dorpavley." There was a brickfield in the vicinity, and all vehicles visiting it had to cross the furrow. All the refuse of the lower end of the village must, owing to the contour of the ground, find its way into the furrow; the remainder of the refuse flows into the rivers on either side. He did not think there had been much increase in the extent of cultivated ground since he was a boy. At the public meeting of householders it was resolved that the servitude rights of defendant should be respected. The Municipality objected to the new furrow, and insisted upon the village having its just proportion of water.

By the Court: Defendant finished the new furrow about nine months ago; but before that there was a sensible diminution in the volume of water. It had not been tested by a gauge. The Municipality had not suggested to defendant that he should allow them to take the water out of the stream higher up, and store it in a reservoir. He did not see why water should not be clean in an open furrow, if not fouled on the farm. The

necessary consequence of the new furrow was to diminish the supply.

Mr. Fagan, secretary to the Municipality, deposed to the proceedings which led up to the present action. On more than one occasion he visited Kruisvallei, in company with Messrs. Albertyn and Marais, and found women washing in the furrow. It was the duty of the street-keeper to clean the water-furrow. The new furrow lost water by percolation and absorption. During the past few years complaints had been more numerous than hitherto about the scarcity of water.

Cross-examined: Every summer there were complaints about the water; some of the villagers were in the habit of stealing it. He could give no direct evidence as to the condition of the furrow. Numerous complaints had been made as to the violation of the water regulations in the village. It had been constantly advanced at Municipal meetings that all the water from Kruisvallei should flow down through the village for certain hours during the day.

Mr. Petrus J. J. Marais deposed that he had resided at Tulbagh for more than fifty years, and knew the farm Kruisvallei. Before the Municipality was established, the village had the water eight hours per day. In 1874, Retief had the farm, and increased the plantations; and after him came Theren, who also increased the cultivated lands, as did his successor, Merrees. The water is not so plentiful as it was before the new furrow was made, because at one point it crossed a sandy soil where the water was absorbed. The water came from a very strong stream in the mountain. He had seen the furrow so diverted that no water reached the village.

Cross-examined: If the village got its proper share of water, he would not object to the new furrow.

By the Court: The population of the village was yearly increasing. The water is much dirtier now than in former days. He had a dam in his garden, which was supplied from the furrow. The inhabitants of Tulbagh depended upon the water in the furrow for their daily supplies.

Rev. J. A. Bushner deposed that the furrow ran alongside his parsonage. On some occasions he saw it nearly dry, there being only about an inch of water in it. He got his supply very irregularly, and latterly the water was impure. In January last he saw eight pigs in the new furrow on Kruisvallei.

Cross-examined: He could not say if last summer was exceptionally dry. He had not noticed much increase in the population of the village since he arrived there in 1888. He did not know how the Park was supplied with water, as he did not visit it. When he saw the new furrow, he told defendant that it looked better than the

old one, but he afterwards observed that in the course of time it would get just as bad. When the streets were watered the surplus ran off into the furrow, as did also the rainwater and refuse from some of the houses.

Albertus Jacob Malherbe deposed that for thirty years he had been the owner of a subdivided portion of Kruisvallei. He got his water from the furrow, which was not so deep as the original one, and was full of sand. Of late years the supply of water for the village had very much decreased. His servants used to wash in the furrow, but he had prohibited them from doing so. Washing was carried on at Kruisvallei. The flow of water had been particularly scarce during the past two years.

Cross-examined: The new furrow would be better than the old one if it was deepened. Formerly, in the summer, the vley ground was dry, but since the new furrow had been made it was always green. People always washed in the old furrow in old Mr. Morrees's time, at a distance of nearly three miles from the village.

Abelom Mentor, Municipal streetkeeper at Tulbagh, deposed that within the past twelve months he had seen the furrow entirely empty. He visited Kruisvallei and found plenty of water there running into the gardens. People complained of being unable to get water for drinking and irrigating purposes.

George Rynhoud Halsell also deposed to the recent great scarcity of water. He had to pay water rates, but sometimes got no water, and had often seen the furrow as dry as his hand. The last two years were not exceptionally dry ones. Recently the water both smelt and tasted bad. The furrow was the only source of supply for the village.

Cupide Apolles deposed to having been sent up by his master (Fagan) to ascertain the reason why the water was not flowing, and found the furrow closed up with soda, and the water running into the vineyard at Kruisvallei.

Willem Adonis deposed that several times during the last summer he had seen the furrow perfectly dry. He went up to Kruisvallei on one occasion and found the furrow blocked up, the water flowing into defendant's vineyard.

Moses Job deposed that he had known Kruisvallei for half a century, when it belonged to Jan Winterbach. In the olden days there was very little cultivation on the place. There was always heretofore a good stream of water, but latterly he had seen the furrow quite dry in Tulbagh village. There were no complaints of scarcity of water when the place belonged to the church.

For the defence was called Adriaan Morrees, who deposed that he was proprietor of the farm Kruisvallei, was a surveyor by profession, and was now in the public service in Bechuanaland.

He purchased the property in 1888 from Theron's assignees. His father used to reside on the farm, when an arrangement was in existence that he should have two-thirds of the water. The first time he heard that the Municipality claimed the rest of the water, and of the time, was at the meeting held on the 24th January last. There was no time division as regarded Kruisvallei. He had never authorised the making of vleys during times of scarcity of water.

Postea (June 8th).

The hearing of this case was resumed. The defendant, Adriaan Morrees, re-entered the witness-box, and his examination was proceeded with. The witness stated that from 1868 to 1874 the cultivation on the farm Kruisvallei rather decreased than increased. Since 1874, in Retief's time, more land was cultivated and vineyards planted. Since he (witness) had acquired the property he had only planted a few trees. The village common was irrigated from the furrow even in summer. On the 20th January, 1891, he noticed that nearly the whole stream was flowing into the village vlei; on the same day he noticed two small streams leading from the furrow into the vlei, and on the 25th, 26th, and 28th of the same month the streams were still running. He pointed out to the Municipality what he proposed to do by constructing the new furrow—it was to protect his vineyard and best lands. He put a nine-inch pipe in the furrow for the purpose of leading the water down to the village. The log of wood was put in the furrow by one of his lessees, to keep the water out of his vineyard, and when he saw it he (witness) ordered its removal. He never received notice concerning the pollution of the water until this action was instituted; he did all in his power to keep the matter out of Court. Washing had been carried on near the mill for the last forty years. He never on any single occasion diverted the water from the village, and in dry seasons gave strict instructions that no dams should be made on the farm. He admitted that there was a certain amount of pollution of the water.

Cross-examined: Theron, a former proprietor of Kruisvallei, never expressed himself as satisfied with one-half of the water, provided he had a larger quantity on Saturdays. He had not altered his opinions since he became owner of the farm. Before the public meeting was held he obtained counsel's opinion as to the position of affairs, but kept it to himself, he considered it adverse to the rights of the village, so far as the water was concerned. He bought the farm for £1,667, and latterly offered it to the Municipality for £3,800. At the time he purchased fixed property was a drug in the market. He had erected a mill, which

cost £500. His object in making the new furrow was not for the purpose of irrigating more land, but to protect his property. The pipe he put in the embankment did not prevent the water flowing down to the village. The population of Tulbagh had considerably increased of late years.

Re-examined: At all times polluted water ran into the furrow from the vineyard, but no official complaint reached him until lately. When he got counsel's opinion he had no notion of purchasing Kruisvallei.

By the Court: Kruisvallei is cut up into four portions, but only two of these portions get water from the furrow; while one other received an inch and a half of water in terms of an old agreement made with Jooste, the original owner.

Gideon M. J. Retief deposed that he was proprietor of Kruisvallei from 1874 to 1879. While there he planted a large number of vines. He always had two-thirds of the water. There was no regulation that he should let all the water flow.

Cross-examined: Theron had taken more land into cultivation since he left. He had no particular hours for leading water; he did so whenever and as long as he felt inclined.

Dr. H. P. Payne deposed that he had been practising at Tulbagh for the last fourteen years. The condition of the old furrow was bad, and ran through a mass of decayed vegetable matter. He got his drinking water from a spot near the railway-station. Refuse water found its way into the furrow from the houses.

Cross-examined: Washing in the furrow three miles from the village might be injurious to the health of the inhabitants, if the clothing of fever patients was washed there.

Charles J. Wood, M.I.C.E., deposed that on two occasions he went to Kruisvallei and inspected the place. The new furrow was shorter than the old one by fifty yards. He did not see how the new furrow could in any way damage the village; it fact it was an improvement. On the 15th February he gauged the water, and found that it came to about 200,000 gallons in twenty-four hours, with a velocity of a foot per second. The pipe was not then running full, and was capable of delivering 600,000 gallons per diem. He noticed a leak in the furrow near the village.

Cross-examined: There was an overflow furrow, the water going down into the river bed. If the pipe was larger, more water would reach the village on certain occasions.

The other witnesses for the defendant were heard on the 9th June, and on the 21st June after hearing counsel, the Court delivered judgment.

The Chief Justice said: Before deciding the main question in this case it is as well that I should dispose of the side issues.

These side issues are, first, that the defendant

has diverted the water by making a new furrow in which he has placed a pipe.

The evidence is conflicting as to whether the new furrow itself is injurious to the lower proprietors, but upon this point we are satisfied that the placing of the pipe in the new furrow is injurious to them, and in times of rain danger must always exist that the pipe will become choked and the requisite stream of water will not flow down.

It is difficult to make an order on this part of the case and the Court will not do so, but express an opinion that the new furrow with the pipe in it is certainly an infringement of the rights of the plaintiffs.

The next side issue is as to whether there has been a pollution of the water, and upon this point there is no doubt but that there has been pollution, as the pigs of the upper proprietors have been in the habit of wallowing in the water and polluting it, and washing of dirty linen has freely been allowed in the stream.

The third side issue is as to whether on certain occasions the defendant's tenants have wholly diverted the water, and on this point also there is no doubt, for the plaintiffs' witnesses have gone up to the defendant's farm and found all the water diverted on to the gardens of his tenants.

We now come to the main question, namely, whether the defendant, as upper riparian proprietor, has or has not used more than his reasonable share of the water.

For the purpose of deciding this question the Court has to look at the extent of the land held by the different proprietors, at the nature of the land, at the mode of cultivation, and also at the order of priority, in point of time, in which the different proprietors became owners.

There can be no doubt that the village of Tulbagh is a very old one; the grants which have been put in date as far back as the middle of the last century, and from the earliest times the rights of the inhabitants to the water have been recognised.

In the grant which was made in 1817 to the first registered owner of the farm Kruisvallei the rights of the lower proprietors are clearly acknowledged. I do not rely upon this as giving any right by grant to the lower proprietors, but only mention it to show who at that time were considered to be in actual enjoyment of the water.

In another grant, namely, that of Witsenberg farm, reference is made to this water, which shows that at that time the Government recognised the rights of the village proprietors and did all it could to preserve the water for their use.

In the year 1828 certain regulations were made which seem to be admitted are still in force, and these regulations provide for the distribution of the water flowing down to the farm Straatskerk.

According to these regulations the owners of Kerkstraat, that is the village, are only entitled to use the water eight hours a day, and it is provided that during the remaining hours (sixteen) the water will have its free flow.

If the Court holds that the defendant is bound to let down a certain proportion, it is not that the plaintiffs may have the whole of the water so flowing down. If one-third is a reasonable share they will only be entitled to one-ninth. If the Court decides upon half they will only get one-sixth, if the regulations are still in force.

The defendant relies on the judgment—so called—of the Landdrost and Heemraden in 1880.

It does not appear that Jooste was a party to that judgment, but when he became aware of it he petitioned to have half of the water. The decision was that he was to allow at least one-third of the water to flow down, from which I do not gather that the judgment was that he could under all circumstances, and in all seasons, and whatever the state of the water, use the whole two-thirds.

There would be good ground for holding that the two-thirds could only be used by Jooste provided he did not interfere with the rights of the other proprietors, but on that point the decision is somewhat obscure.

During the time when Kruisvallei was a church farm the evidence clearly shows that not much of the land was under cultivation.

According to one witness there is four times more land under cultivation now than in the days of the Church, and the whole tenour of the evidence satisfies me that the Church did not make use of the water now asked for on behalf the defendant.

I am quite satisfied that the Church did not ordinarily use two-thirds of the water.

There is a minute, which was admitted in the evidence, that on one occasion, on a Saturday afternoon, two-thirds of the water had been used, but this fact certainly does not show that the owners of Kruisvallei could have, whenever they wished it, the whole two-thirds.

I think that the least the upper proprietor should do would be to allow half the water to flow down. The evidence clearly shows that since the defendant has become the owner of the farm, the village supply has visibly diminished, and there has therefore been an infringement of the plaintiffs' rights, either by the defendant or his tenants using more than a reasonable share of the water.

With regard to the pollution of the water on which the inhabitants of the village depend for their drinking supply, I suggested the advisability of the villagers taking steps to lay down pipes from the source, but it is said that the village is short of funds.

It is to be hoped that it will get a supply of pure water, because whatever pains may be taken by the upper proprietors it is impossible that the water can be always pure.

The Court will therefore confine itself to the first count of the declaration, and adjudge that the defendant, as a riparian proprietor, has made an unreasonable use of the water inasmuch as he has used more than half, and the Court will restrain him by perpetual interdict from making such unreasonable use in the future.

Further, in respect of the pollution of the stream he will be interdicted from allowing clothes to be washed therein.

Judgment will therefore be given for the plaintiffs in terms of the first count of the declaration with costs, including the expenses of the plaintiffs who gave evidence.

[Plaintiff's Attorney, C. C. de Villiers; Defendant's Attorneys, G. Montgomery-Walker.]

SUPREME COURT.

[Before Sir J. M. DE VILLIERS, K.C.M.G. (Chief Justice), and { June 8th, 1892.
Mr. Justice BUCHANAN.]

REGINA V. VAN VLIET.

The Chief Justice said that a question had been reserved for argument before the Court in the matter of one Van Vliet, who was tried at the Uitenhage Circuit Court for the crime of arson by setting fire to his wife's house, he being married to her in community of property. The learned judge sentenced the man to two years' hard labour, but reserved the point as to whether a man could be convicted of arson under the circumstances.

The Court requested Mr. Sheil to argue the point on behalf of the prisoner.

REGINA V. FORTUIN.

The Chief Justice said that this case had come before him on review from the Special Justice of the Peace at Frenchhoek. The accused was convicted of contravening a Municipal regulation by allowing a cow to stray in a public street. The only evidence against the accused was that of a witness who said that he saw the cow wandering in the street, and on asking whose it was he was informed that it belonged to the accused. This evidence was insufficient, and the conviction must be quashed.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. } 9th June,
Justice BUCHANAN, and Mr. } 1892.
Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

MASTER SUPREME COURT V. MOSTERT'S EXECUTOR.

Mr. Giddy moved for an order compelling the defendant to file liquidation accounts in terms of Ordinance 104.

The Court granted the order with costs *de bonis propriis*.

MASTER SUPREME COURT V. CROOKHART'S EXECUTORS.

Mr. Giddy appeared for the Master, and Mr. Shell for one of the executors, Mr. William Thomas Kingsmill.

This was an application for an order to compel the defendants to file the final liquidation account in the estate of the late James Crookhart, of Humansdorp.

It appeared from the affidavit of Mr. Kingsmill one of the executors, that all the assets of the estate were situated in the district of Humansdorp, and that the administration had been left with the co-executor, Mr. William Anderson, of Humansdorp, who had, however, neglected to file the final liquidation account, although he had been frequently requested to do so by his co-executor.

Mr. Shell said that although the terms of Ordinance 104 had not been complied with, still he would ask the Court to take into consideration the position of Mr. Kingsmill, who had entrusted the entire administration of the estate to the resident co-executor, Mr. Anderson. The non-compliance with the terms of the Ordinance was not occasioned through the fault of Kingsmill, who had done everything which he could to induce his co-executor to file the final account, and was now about to ask the Court to remove Anderson from his trust, and that an extension of six months might be given within which to file the final account. Under these circumstances, costs *de bonis propriis* should not be given against Kingsmill.

The Chief Justice said that more than four years had elapsed since the appointment of the defendants as executors. If Anderson had not done his duty, his co-executor should have approached the Court before this and asked to have him removed. There was no reason for departing from the general rule.

The order would be granted with costs *de bonis propriis*, but an extension of three months would be allowed within which to file the final account.

KURANDA AND MARAIS V. LANGTON.

On the motion of Mr. Molteno, the provisional order for sequestration was discharged.

BOARD OF EXECUTORS V. ROCHER'S EXECUTRIX.

Insolvency—Ordinance 6 of 1843, section 17
Service of process—Practice.

Where an insolvent has left the Colony application should be made for direction as to substituted service at the time the petition for provisional sequestration is presented.

Mr. Schreiner, Q.C., in moving that the provisional order for sequestration should be made final, asked the Court to settle the practice as to service of process in cases in which the defendant has left the Colony.

It appeared that in the present case the defendant had been absent in the Transvaal since 1890; that the property in the Colony had been attached to found jurisdiction; that judgment had been obtained by default after service of summons by edict, that there has been a return of *nulla bona*, and thereafter copy of a summons for sequestration of the estate had been affixed on the outer door of the Supreme Court, and inserted in the *Government Gazette* in accordance with the proviso to section 17 of Ordinance 6 of 1843.

Mr. Schreiner asked whether, the formalities required by the proviso to the 17th section having been complied with, any further service should have been effected, or whether that service was good as substituted service.

The Chief Justice referred to the word "also" in the section, which seemed to indicate that there should be some service in addition to fixing copies of the summons on the door of the Supreme Court and publication in the *Gazette*.

The Court intimated, for future guidance, that at the time of presenting the petition for the provisional order application should be made for a direction as to substituted service in such cases; but, under the special circumstances of the present case, granted an order *nunc pro tunc* for substituted service by publication in the *Gazette*, and thereupon decreed the final adjudication of the defendant's estate.

FAIRBRIDGE AND ARDENNE V. ANDERSON.

Mr. Watermeyer applied for judgment on the sum of £277 8s. 10d., for personal services and money disbursed.—Granted.

GROBBELAAR V. GROBBELAAR.

Mr. Juta for plaintiffs; Mr. Maskew, as *curator ad litem*, for defendant.

This was an action instituted by the defendant's children to have him declared of unsound mind, and incapable of managing his own affairs.

Dr. J. H. Cox, surgeon-in-charge of the Old Somerset Hospital, deposed that Grobbelaar, who was seventy-one years of age, was admitted as a patient on the 21st March last. In his opinion the man was of unsound mind; he was suffering from dementia, and had delusions about marriage. He was indecent in his language towards females, and it would not be safe to set him at liberty. At his advanced age there was no chance of recovery.

Samuel Needham gave corroborative evidence.

J. F. Marais, son-in-law of Grobbelaar, deposed that defendant possessed land and houses, and £600 in money. He used sometimes to be very violent and indecent in his conduct.

Grobbelaar, the defendant, said his son-in-law was telling a pack of lies, as he could prove by witnesses.

The Chief Justice said that if the case depended entirely upon the evidence of Marais there might be some doubt as to the defendant's insanity, but there was no doubt about the evidence of Dr. Cox and Needham, and the Court would declare Grobbelaar to be of unsound mind, and appoint Mr. B. Wethmar, of Malmesbury, curator of his property, and Dr. Cox curator of his person, costs to come out of the estate.

[Plaintiffs' Attorney, J. C. Berrangé & Son.]

JAMES V. JAMES.

Mr. Molteno appeared on behalf of the wife, the plaintiff, and applied for an order calling upon the husband to restore her to conjugal rights; also asking the Court to make absolute the rule *nisi* for payment to the applicant of the amount of an inheritance accruing to her out of the estate of her late grandmother to enable her to institute proceedings for restitution of conjugal rights. Mr. Molteno read the affidavit of William Shaw, Deputy Sheriff at Johannesburg, which was to the effect that he had made diligent search for James, but could not find him, and was of opinion that he had left for Mafanaland.

Georgina S. C. James deposed that she was married at Caledon on the 18th March, 1882, and lived happily with defendant for two and a half years, when he took to drink and broke up the home. He sold everything and spent the proceeds in liquor. There were three children of the marriage, but the only survivor was a boy, now nine years old. Since defendant went away she had not seen him, but had heard that he had been in prison at several places for drunkenness. She never received any letters from him nor any sup-

port. She gained her livelihood by teaching at Rondebosch. Her grandmother had left her the sum of £50.

The Chief Justice said that the Court would make the rule *nisi* absolute, and would also grant an order calling upon defendant to return to his wife on or before the 15th July next, failing which a rule *nisi* would be granted calling upon him to show cause by the first day of next term why a decree of divorce should not be granted, and his wife have the custody of the child of the marriage.

CONTAT V. ELAND AND OTHERS.

Mr. Juta applied for leave to the defendants, Eland and Seaville, to file their plea in the suit between the parties.

CONTAT V. WARD AND OTHERS.

Mr. Schreiner applied for the removal of the suit, on application of the defendants Ward and Corbridge, for trial before the High Court.

Mr. Searle opposed both applications, and said that if Eland and Seaville had entered appearance at the proper time there would have been no delay. As to the other application, if the case were removed to Kimberley they would have to wait until the 15th August, and his clients were particularly anxious that it should come on for trial here.

The Chief Justice inquired if the costs would not be heavier if the case were heard here.

Mr. Searle said, taken all round, the costs were less here than at Kimberley. There were very few witnesses, and he did not think the case would occupy more than a couple of days. He strongly urged, particularly on the ground that Welch's case had been heard at Kimberley, that this action should not be relegated to that place. There was an evident desire to delay the action. He asked the Court to decide that, if the case could not be heard this term, it might be heard in the Supreme Court next term.

Mr. Schreiner strongly urged that the case should be heard at Kimberley. They had to subpoena witnesses from the Free State, and it was not possible to get them to the Supreme Court before the 14th inst.; further, if the case was heard here, the Registrar of the High Court would have to come down to Cape Town.

The Court granted the first application, and refused the second—the cases to be heard in the Supreme Court next term, and costs to be costs in the cause.

JANSEN V. FINCHAM AND ANOTHER.

Mr. Juta moved for an order postponing the trial of this suit, set down for the 14th inst., to 1st August next, on the ground of the impossi-

bility of producing witnesses material for the defence on the 14th inst.

The Court appointed the 18th July for the hearing of the case; the question of costs to stand over.

IN RE THE UNION BANK, IN LIQUIDATION.

Liquidator's Second Report.

Mr. Schreiner, Q.C., presented the following report of the official liquidators: 1. The liquidators annex hereto a statement showing in a condensed form particulars of their receipts and payments from 1st August, 1890, to 30th April, 1892. In this statement actual cash receipts are distinguished from amounts set off by contributors and debtors. The balance of "Amounts received in Trust" and overdraft due to the Standard Bank have been discharged since 30th April last.

2. In accordance with the authority given by your honourable Court, dividends amounting in all to 15s. on all claims proved have been paid, as per annexure to the account mentioned above. Bank notes and amounts standing to the credit of current accounts under £100 due to depositors, not being shareholders, had already been paid out in full by order of the Court. The total amount so distributed is £517,500 2s. 6d., of which £455,876 9s. 1d. has been paid in cash, and £61,623 14s. 5d. by fixed deposits and other obligations of the bank applied by way of set-off.

3. At the earliest possible date the liquidators curtailed the costs of administration as much as possible, retaining after the first work of the liquidation the services of four of the bank staff only. Subsequently, as the business to be transacted became more concentrated, the staff was still further lessened, until, in September last, the liquidators found themselves in a position to dispose of the bank premises, since when the business connected with the bank has been transacted in the offices of the South African Association, with the assistance of one clerk, who possesses special knowledge of the securities held. As will be seen from annexure A, the total cost of the liquidation for twenty-one months, including salaries, general charges, and incidental expenses, as well as the greater portion of the costs of the Beit case, have been £2,891 15s. 6d., against which considerable earnings of commission, &c., have been received.

4. The order granted by your honourable Court on February 5, 1891, enabling the liquidators to deal directly with the securities held by the Standard Bank, has proved of considerable benefit to the liquidation. By cautious realisations, as opportunities offered, the liquidators have been enabled to pay over to the Standard Bank the sum of £177,146 15s. 5d. in reduction of their admitted

claim of £219,060 9s. 11d., whilst the collections by the latter institution have reduced the balance due at 30th April last to £24,507 5s. 9d. Against this balance the liquidators hold securities, valued, at present quotations, for £45,404 4s. 9d.

5. The present position of the liquidation, as compared with the figures contained in our first report, may be tabulated for easy reference as per annexure B hereto. The apparent discrepancy in the item "amounts due by other banks and London agents" is owing to the account of the latter containing sundry credits for drafts drawn by the Union Bank on their London agents, but not accepted at the date of stoppage. The liquidators regret that owing to the subsequent failure of the Cape of Good Hope Bank (Limited), and of several firms doing business with that institution, the amounts collected from unsecured debtors have in some instances fallen considerably short of the valuations made before such failures, but notwithstanding the many depressing influences and changes, which have had a very important bearing on the realisations of these securities, the result thus far has been satisfactory, and has enabled your liquidators to more than recoup this deficiency. Annexure B shows the original valuations of all debtors' securities and calls to have been £349,712 18s. 11d., of which the liquidators have since received £699,422 12s. 9d., and hold securities and other assets at present valued for £164,262 12s. 8d., or a total of £863,685 5s. 5d. The total liabilities of the bank at 30th April, 1892, had been reduced to £199,720 10s. 10d., as follows:

As per books of the Bank.

Deposits, fixed	£104,974 8 2
Deposits, floating	41,072 1 4
Notes outstanding	992 10 0
Standard Bank, secured account	24,507 5 9
Standard Bank, overdraft ...	8,928 18 2
Amts. recvd. in trust, £2,900 9s.	
Less Union Bk share, £1,609 16s 7d	1,350 12 5
Law charges, &c. (estimated) ...	250 0 0
Interest accrued to creditors ...	22,750 0 0
Total	£199,720 10 10

Against which the liquidators estimate the assets still held together with calls already made will realise a sum of, say ... £164,262 12 8

Showing an estimated deficiency of £35,457 18 2

[NOTE.—The fixed deposits have all been duly proved. Of the floating deposits £702 5s. 9d., and notes outstanding £992 10s., or £1,694 15s. 9d. in all still remain unproved.]

To meet this and other incidental charges in finally winding up the bank, the liquidators see no course open but to recommend a further call; and

unless anything specially unforeseen should happen, your liquidators estimate a call of £85 per share sufficient to meet the requirements of the liquidation. They would suggest that this call be made payable at once, with interest at 6 per cent. per annum from date of confirmation of said call. To save the cost of fresh applications, it is suggested that in cases where arrangements for extended payments of calls have been made with the approval of the Court, your liquidators be authorised to extend such arrangements to cover the call now recommended.

6. There are some creditors who have not yet proved their claims, and notes are still outstanding to the extent of £992 10s. The liquidators suggest that in accordance with precedent the 31st day of July next be fixed as a final date, after which such claims and notes will be barred from ranking against the bank.

7. As the liquidators are somewhat inconvenienced by having to find storage for all the old books and records of the bank, which are of no further use, they request the authority of your honourable Court to destroy such books and papers as relate to transactions of eight years and more prior to the failure of the bank.

8. With regard to the case which the liquidators brought against Mr. Beit, and in which absolution from the instance was granted by this honourable Court, your liquidators have now to state that they are being advised as to the desirability or otherwise of initiating further proceedings in the matter.

9. The liquidators venture to suggest that the time has now come when their remuneration for past and future services may be fixed by the Court. They have experienced some difficulty in arriving at any recommendation on the subject. They may point out, however, that the cash actually passed through their hands totals some £640,000, and that the liquidation has to a large extent been conducted by the liquidators personally without the assistance of an expensive staff of clerks. The matters dealt with have been in some cases of exceptional intricacy, and the liquidators trust your honourable Court may think it proper to take these points into favourable consideration when deciding the question of remuneration. The liquidators now have to solicit the order of this honourable Court on the various points already referred to above, namely:

(a) To confirm the statement of accounts presented. The cash-books now in use to be filed on the final winding up of the bank.

(b) To assess the amount of call and time of payment, under the 22nd section of the Winding-up Act.

(c) To authorise the liquidators in their discretion to extend arrangements for payment of calls already sanctioned by the Court to any call which may be made upon the foregoing report.

(d) To fix a date after which all claims and notes outstanding shall be barred from proving against the bank.

(e) For authority to destroy the books and papers relating to the business of the bank in use eight years and more prior to the date of the Union Bank being placed under the Winding-up Act.

(f) To fix the remuneration to be paid to the liquidators.

Dated at Cape Town this 4th day of June, 1892.

(Signed) G. W. STYTLER, } Official
H. GIBSON, } Liquidators.

The following are the annexures to the report:

UNION BANK, IN LIQUIDATION.

First account rendered by the official liquidators, showing the result of their transactions from the appointment of provisional liquidators on August 1, 1890, to April 30, 1892:

	Cash.	Set off.	Total.
	£	£	£
To cash:			
In treasury of bank ...	45521	—	—
Clearance account, Standard Bank ...	8452	—	—
Clearance account, Bank of Africa ...	5731	—	54705
To assets collected:			
Dividends in insolvent estates (written off in bank books as bad) ...	857	—	—
Overdrafts ...	13288	9218	—
Bills paid ...	145694	16824	—
Advances on bonds and securities ...	8430	—	—
Collected through London agents ...	6662	146	—
Stamps realised ...	124	—	—
Properties sold:			
Bank premises and furniture ...	4397	—	—
Other Cape Town property ...	853	—	—
Worcester property ...	630	—	—
Swellendam property ...	976	—	207600
To calls collected:			
First call ...	212268	46754	—
Second call ...	72994	58	—
Interest on calls ...	1752	—	338647
To amounts received in trust:			
For division between this bank and other creditors, £51,261 0s. 9d., less credited to call and other accounts, £40,722 4s. 11d. ...	10538	—	10538
To collections for Standard Bank, under order of Supreme Court dated 5th February, 1891;			

Bills collected	11961	—	—
Amount received in trust	1628	—	—
Securities realised ...	81408	—	—
Dividends on securities...	8570	—	108469
Total earnings in liquidation:			
Interest	1677	—	—
Commission	882	—	—
Rents received	98	—	216
To Standard Bank :			
Overdraft	8928	—	8928
	<u>648586</u>	<u>72501</u>	<u>716088</u>
By Cape of Good Hope Bank (Limited):			
Balance of clearance account secured by cheques held	814	—	814
By amounts set off:			
Drafts on London returned	—	7895	—
Interest on fixed deposits	—	842	—
Impersonal accounts ...	—	1998	10781
By amounts received in trust:			
Paid to creditors other than this bank	7688	—	7688
By Standard Bank (secured account):			
Clearance account transferred	8452	—	—
Payments on account dividends	87000	—	—
Bills retired, makers having effected compromises	28780	—	—
Securities realised	9444	—	—
Collections as per contra	108469	—	177146
By dividends paid as per annexure, being 16s. in the £ on all claims (bank notes presented and floating deposits not exceeding £100 being paid in full) ...	455876	61623	517500
By costs in liquidation:			
General charges (including salaries, stationery, postage, &c.)	1580	—	—
Law charges, general (unrecovered), law charges (special), Beit's case (portion)	814	—	—
London agents' charges	—	146	2891
By payments to protect securities:			
Premium on life policies, &c.	805	—	805
By petty cash:			
On hand	10	—	10
	<u>648586</u>	<u>72501</u>	<u>716088</u>

ANNEXURE B.

ASSETS.	FIRST REPORT.				SECOND REPORT.			
	Valuation as per Bank Books.	Valuation as per Liquidators.	Collected to April 80.	Est. val. of sec., &c., held.	Total.	Collected to April 80.	Est. val. of sec., &c., held.	Total.
Coin, cheques, and notes of other banks	£45621 15 8	£45621 15 8	£45621 15 8	...	£45621 15 8	£45621 15 8	...	£45621 15 8
Balances due by other banks and London agents	21671 0 0	21670 0 0	16992 10 2	...	16992 10 2	16992 10 2	...	16992 10 2
Bank premises and furniture	2975 0 0	2975 0 0	4897 16 0	...	4897 16 0	4897 16 0	...	4897 16 0
Stamped cheques	124 7 6	124 7 6	124 7 6	...	124 7 6	124 7 6	...	124 7 6
Bills discounted, due and overdue	866364 15 10	860221 6 0	282488 2 2	£90811 8 7	856099 5 9	282488 2 2	£90811 8 7	856099 5 9
Advances on banks and securities	26781 17 11	18212 8 7	3969 8 8	3969 8 8	12889 6 0	3969 8 8	3969 8 8	12889 6 0
Overdrawn accounts, including advances to public institutions	62299 5 11	46819 9 0	22501 12 0	16612 8 2	89118 15 2	22501 12 0	16612 8 2	89118 15 2
Landed property	4727 12 5	8467 12 7	...	...	8860 10 9	...	...	8860 10 9
Amount written off in books as bad collected by liquidators ...	...	...	2460 10 9	900 0 0	...	2460 10 9	900 0 0	...
Add:			857 17 7	...	857 17 7	857 17 7	...	857 17 7
Total	£2970816 14 10	£2970816 14 10	£2865774 14 2	£112028 10 0	£2477897 4 2	£2865774 14 2	£112028 10 0	£2477897 4 2
Call on contributors, £100 per share, on 7,876 shares ... ..	...	268800 0 0	268800 0 0	268800 0 0	...	268800 0 0	268800 0 0	...
Call on contributors, £5 per share, on 7,876 shares ... ..	...	96000 0 0	78082 10 2	62280 2 8	886878 1 8	78082 10 2	62280 2 8	886878 1 8
Interest ... ..	...	...	1572 17 4	...	...	1572 17 4	...	...
Amounts collected not included in above	£2970816 14 10	£2970816 14 10	£2699422 12 9	£164262 12 8	£2868686 5 6	£2699422 12 9	£164262 12 8	£2868686 5 6
Trust moneys received and disbursed ... ..	...	...	10688 15 10	...	...	10688 15 10	...	...
Earnings in liquidation ... ..	...	...	2153 5 0	...	...	2153 5 0	...	...
Overdraft at bankers ... ..	...	...	8923 18 2	...	...	8923 18 2	...	...
Cape Town, 4th June, 1892.			£2716088 6 3	...	...	£2716088 6 3	...	...

The Chief Justice: What was the last call?
 Mr. Schreiner: There were two calls; one for £100, and the other for £50, which followed each other in very quick succession.

The Chief Justice: Will this be the final call?

Mr. Schreiner: Yes, I think so. The matter has been very carefully gone into by the liquidators.

Mr. Justice Buchanan: It would be very undesirable to make the call higher than is absolutely necessary.

The Court granted a rule nisi, returnable on 21st June, calling upon all persons interested to show cause why a further call of £85 per share should not be made.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, (10th June,
K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. 1892.
Justice UPINGTON, K.C.M.G.)]

COLONIAL GOVERNMENT V. STANDARD BANK
Bank-note duty—Act 6 of 1864, section 4—
Act 6 of 1891, section 50—Construction.

Mr. Schreiner, Q.C., and Mr. Giddy appeared for the plaintiff, and Mr. Searle and Mr. Graham for the defendant company.

This was an action instituted by the Assistant Treasurer-General of the Colony against the Standard Bank for the sums of £5,427 18s. 7d. and £2,211 15s. 11d., alleged to be due as duty on notes in circulation during the first nine months of 1891 and during the last three months of the same year, under the provisions of Act 6 of 1864 and Act 6 of 1891.

The declaration was as follows:

1. The plaintiff is the Assistant Treasurer and Receiver-General of Revenue of this colony, and as such represents the Colonial Government. The defendant company is a joint-stock bank carrying on business in this colony and elsewhere in South Africa.

2. During the whole of the calendar year 1891, the defendant company traded as bankers in this colony and issued bank notes at its head office in Cape Town and at its branch office in Port Elizabeth, payable at the said places of issue respectively.

3. By reason of the provisions of the first section of Act No. 6 of 1864, the defendant company was bound and obliged to transmit to the Treasurer-General of the Colony monthly returns of the bank notes in circulation by it.

4. In terms of the fourth section of the said Act, the defendant company was chargeable with

a yearly duty, recoverable by the plaintiff, of one and a half per cent. upon the average note issue of each year, to be ascertained by adding together the amounts set forth in the several monthly returns aforesaid and by then dividing the result by 12; the plaintiff refers this honourable Court to the words of the said section and of the said Act.

5. The said Act was repealed by the provisions of the Bank Act, 1891, which came into force on the 28th day of October, 1891.

6. By the 48th section of the said Bank Act, 1891, it was provided that every bank issuing bank notes under the provisions of that Act should be bound to transmit to the plaintiff monthly returns of all bank notes issued by it in circulation on the last day of the month, and that, in the case of banks having an issue of bank notes outstanding at the date of taking effect of the said Act, the return should include all such notes in circulation on the last day of the month to which it related.

7. The 50th section of the said Bank Act, 1891, provided that in the months of January and July in each year every bank issuing bank notes should pay to the plaintiff a duty of 10s. per centum upon the average amount of bank notes in circulation for the half-year next preceeding, and such average shall be calculated by adding together the monthly returns during the half-year for which such duty is levied, and by dividing the gross sum by the number of months for which such returns are made.

8. The defendant company has from time to time duly rendered to the plaintiff monthly returns showing the bank notes in circulation by it as aforesaid on the last day of each and every month during the year 1891. The plaintiff annexes hereto a memorandum showing the items of the said monthly returns.

9. The plaintiff submits that there is payable by the defendant company duty at the rate of £1 10s. per centum upon the average note issue of the said bank for the nine months ending the 30th day of September, 1891, and duty at the rate of 10s. per centum upon the average issue for the three months ending the 31st day of December, 1891.

10. The amounts of duty so payable are the sums of £5,427 18s. 7d. and £2,211 15s. 11d. respectively. The plaintiff annexes hereto a memorandum showing the particulars of the said amounts.

11. The plaintiff has demanded payment of the said duty in writing, but the defendant company refuses the same, though all things have happened, all conditions have been fulfilled, and all times elapsed necessary to entitle the plaintiff to receive the said amounts.

The plaintiff claims:

(a) Payment of the said sums of £5,427 18s. 7d. and £2,211 15s. 11d. respectively.

(b) In the alternative, an order declaring the amount of duty owing by the defendant company to the plaintiff in terms of the said Act.

(c) Such alternative relief as to this honourable Court may seem meet.

(d) Costs of suit.

The defendant's plea was as follows :

As to the claim of the plaintiff, wherein plaintiff asks for a declaration of rights, the defendant pleads specially that there is a variance between the summons and declaration, and that he is prejudiced thereby ; that the plaintiff, under section 50 of Act 6 of 1891, is bound to make a demand in writing of a certain amount from the defendant bank ; that a demand has been made of nine months' duty under Act 6 of 1864, and three months' under Act 6 of 1891, and that plaintiff is not now in this suit entitled to claim a declaration of rights as to the amount of duty payable, and that the said claim is embarrassing to the defendant in his defence, seeing that it is impossible for the defendant to make any tender in respect thereof, and the said claim is not contemplated by the terms of the said Act. Wherefore the defendant prays that the said claim may be expunged.

And as to the other claims in the declaration, the defendant bank admits paragraphs 1 and 2, save that it says that the head office is in England ; but it admits that the offices in Cape Town and Port Elizabeth did issue bank notes during the whole of the year 1891.

With regard to the terms of the sections of the Acts 6 of 1864 and 6 of 1891, in paragraphs 3, 4, 6, and 7 referred to, the defendant craves leave to refer to the said sections for the legal effect thereof.

The defendant admits paragraphs 5 and 8, and the amounts of the said monthly returns stated in the memorandum, but he denies the correctness of the amount of duty stated therein ; the defendant says that inasmuch as Act 6 of 1864 was repealed by Act 6 of 1891, promulgated on October 28, 1891, no duty can be demandable under the said repealed Act.

The defendant denies paragraphs 9, 10 and 11, save that he admits that payment of duty has been demanded, in writing, in accordance with the memorandum, and that he has refused to pay the sum demanded.

The defendant has always been ready and willing, and has tendered, and hereby again tenders to pay the sum of £1,105 18s. as and for duty for the three months, October, November, and December, demanded of him under Act 6 of 1891, with interest and costs from 6th February to 1st day of April, 1892 ; but the defendant says that he is not liable to pay either the sum of £5,427 18s. 7d. or the sum of £2,211 16s. 11d., demanded as aforesaid, the latter amount being calculated upon an incorrect basis. Wherefore the

defendant prays that plaintiff's claims (a), (c), (d) may be dismissed with costs.

The replication was general, save that it admitted the tender of £1,105 18s., with interest and costs as alleged in the plea, but said that the tender was wholly insufficient.

Upon these pleadings issue was joined.

No oral evidence was adduced by either side, as the case depended mainly on the construction of the Acts referred to in the pleadings.

Mr. Schreiner contended that the obligation of the bank under Act 6 of 1864, section 4, being in existence at the date of the repeal of that Act, could not be discharged by the mere repeal. When a month's statement was rendered by the bank, duty for that period was due. The duty became due from month to month, but was only payable at the end of the year. The obligation accrued monthly. Counsel referred to the 50th section of Act 6 of 1891, which he read.

The Chief Justice observed that where one Act repealed another, and substituted provisions for the old Act, the old provisions remained in force until the new provisions came into operation.

Mr. Schreiner referred to the case of "The Attorney-General v. Lamplough," L.R. 8, Ex. Div., 214. The tender was insufficient, the defendant was liable for full amount of claim.

Mr. Searle, with regard to the exception taken in the plea to the plaintiff's claim for a declaration of rights, contended that such a declaration was not comprehended by the Act, as the amount of duty payable could not be ascertained until the end of the year (section 4). The first claim of the Government had been extinguished by the repeal of the old Act. The Government should have waited until January, 1892, before promulgating the new Act—not having done so, they lost their rights by the repeal of the old Act. Where a statute levied taxes it should be construed against the Government and in favour of the subject.

The Chief Justice referred to the preamble of Act 6 of 1864.

Continuing, counsel urged that as to the second claim of the Government the amount of the tender was sufficient under section 50 of Act 6 of 1891.

Cur ad vult.

Postea (June 16.)

The Court delivered judgment.

The Chief Justice said : The plaintiff, as the Treasurer of the Colony, claims from the Standard Bank the sums of £5,427 18s. 7d. and £2,211 16s. 11d., as bank note duty for the first nine months and last three months respectively of the year 1891. The decision of this case in regard to the duty for the first nine months must depend upon

the question whether on the 28rd of October, 1891, when the Bank Act of that year came into operation, the defendant bank had incurred a liability to such duty under Act No. 6 of 1864. The preamble to the Act of 1864 recites that the privilege enjoyed by the joint-stock banks of the Colony of issuing bank notes is one in regard to which a duty, regulated by the average amount of such notes kept in circulation by each bank, may justly be imposed. The fourth section enacts that every bank shall be chargeable with a yearly duty of $1\frac{1}{2}$ per cent. upon the average issues of each year ending the 31st of December, such average issues to be ascertained by adding together the amounts set forth in the several monthly returns of such bank for such year, and by then dividing the result by twelve. Then follows the proviso that the duty for every year shall be payable upon demand in writing by the Treasurer-General, and shall be recoverable by him by action in any competent Court, together with full costs. It is admitted, on behalf of the defendant, that under the Act any bank which issues notes during, say, the first nine months only of any year would be liable to pay duty for that period. The Treasurer-General could not recover the amount until after the 31st of December, but the amount would in no case be less than the sum of the nine months divided by twelve. On the 1st of October of any year it could be ascertained with precision what the minimum amount of duty for the year would be, whether the bank issued notes after that date or not. A liability for a good amount had been incurred, which might be increased, but could not be diminished, according to the note circulation during the ensuing three months; but the date for the recovery of the amount is postponed until the end of the year. On the 28rd day of October the Bank Act, 1891, came into operation. That Act repeals the Act of 1864. The bank now contends that the effect of the repeal is to extinguish its liability to duty for the first nine months of 1891. It is by no means clear that under our common law the repeal would have that effect. According to Vett (1, 8, 17), things validly done under any law retain their validity, notwithstanding the subsequent repeal of such law. This is but a consequence of the well-known rule of the civil law (Code, 1, 14, 7): *Leges et constitutiones futuris eorum est dare formam negotiis, non ad facta præterita revocari*. Any doubt, however, which might exist on the point is removed by the 10th section of Act No. 5 of 1888, which enacts that "the repeal of any law shall not have the effect of extinguishing any penalty, forfeiture, or liability incurred under such law unless the repealing Act shall so expressly provide and such law shall be treated as still remaining in

force for the purpose of sustaining any proper action or prosecution for the enforcement or recovery of such penalty, forfeiture, or liability." This enactment meets any difficulty which might have been occasioned by the proviso to the fourth section of the Act of 1864, which I have quoted. That proviso, read by the light of the rest of the section, would seem to contemplate that a demand in writing cannot be made nor an action brought until on or after the 31st of December of any year, but the interpretation clause to which I have just referred provides that if a liability has been incurred under any law, that law, although repealed, shall be in force for the purpose of sustaining any action instituted to enforce such liability. Notwithstanding the repeal, therefore, of the Act of 1864 on the 28rd day of October, 1891, it remained in force thereafter for the purpose of sustaining any action brought by the plaintiff to enforce the liability incurred by the bank on the 1st of October to pay the duty for the previous nine months of the year. The sum of the monthly returns for that period has been divided by twelve to ascertain the average issues on which duty is payable under the Act of 1864. The duty thus calculated amounts to £5,427 18s. 7d., for which judgment must be given in favour of the plaintiff. But in addition to the duty for the first nine months, the plaintiff also claims duty for the last three months of 1891. This he calculates by dividing the sum of the monthly returns by three and charging half per cent. on the quotient under the 50th section of the Bank Act, 1891. The amount thus arrived at is £2,211 15s. 11d. We thus arrive at the startling result, which does not seem to have occurred to the parties or to their counsel, at all events it was not brought to the notice of the Court, that although the Act of 1891 reduces the duty, the plaintiff now claims more than if the Act of 1864 had still been in force, and the last three months' returns had fallen under the $1\frac{1}{2}$ per cent. duty. Such a result was clearly not intended by the Legislature, although it clearly follows if duty is to be chargeable under both Acts. If the plaintiff is entitled, as in my opinion he is, to recover the duty for the first nine months he cannot recover any duty in the average issues of the last six months of the year which he really would do if his second claim were allowed. The Bank Act, 1891, provides for a half-yearly duty of half per cent. upon the average amount of bank notes in circulation for the half-years ending 30th of June and 31st of December in each year. Such average is to be calculated by adding together the monthly returns during the half-year for which such duty is levied, and by dividing the gross sum not by six, but by the number of months for which such returns are made. The adoption of such mode of

calculation shows that the Legislature intended the new Act to come into operation at the beginning of a half-year. Moreover, if this mode of calculation were applied in the present case, the bank would be made to pay duty for three months in respect of which it had already incurred a liability under the Act of 1864. If therefore the plaintiff seeks to enforce that liability, he cannot, in my opinion, recover duty for any part of the year 1891 under the Act of 1891. The Government might have obviated the difficulty by postponing the promulgation of the Act till the beginning of this year. The bank has tendered the sum of £1,105 18s. as duty for the last three months of 1891 upon the basis of dividing the returns by six, but as this tender was made upon the assumption that no duty is payable for the first nine months, it ought not to prejudice the bank's defence. The judgment of the Court will be for the plaintiff for the sum of £5,427 18s. 7d., which represents the minimum liability actually incurred by the bank on the 1st of October, 1891, and as the amount tendered was not sufficient the judgment must be with costs.

Their lordships concurred.

[Attorneys for the Government, Messrs. Reid & Nephew; Attorneys for the Bank, Messrs. Fairbridge & Arderne.]

OTTO V. LATEGAAN. { 1892.
10th June.

Award of arbitrators—Rule of Court—Penalties—Action for—Resident Magistrate—Jurisdiction—Exceptions—Appeal—Magistrate's judgment altered to absolute from instance.

Mr. Searle appeared for the appellant, and Mr. Juta for the respondent.

This was an appeal from a judgment of the Resident Magistrate of Oudtshoorn in a suit in which the present respondent was plaintiff and the appellant defendant.

The action was brought for the recovery of penalties imposed by an award of arbitrators. The summons alleged that plaintiff and defendant were proprietors of defined shares of Lot A of the farm Zeekoe River, in the division of Oudtshoorn.

That the said farm was divided by arbitrators, whose award was duly published and made a rule of Court, and that the plaintiff and defendant held their respective shares subject to the terms of the said award.

That by existing servitudes plaintiff was entitled during certain periods to the free and uninterrupted use and benefit of the water supplied by a certain dam and watercourse situated

on the west side of Wynand's River, and known as "Dam A."

That it was provided, *inter alia*, by the terms of the award aforesaid that any proprietor who should lead water out of any of the watercourses out of his turn of water-leading, or who should fail to secure his damming places and other outlets, so that the water should escape on to his lands during the turn of any other proprietor, should, upon conviction, be liable for every such offence to a fine not exceeding £10 sterling or less than £1 sterling.

That on or about 18th January last the defendant, through her tenants or representatives, wrongfully and unlawfully diverted the water flowing in the before-mentioned watercourse, and knowingly suffered and permitted the water to escape on to her lands during plaintiff's turn of water-leading, depriving him of its use and benefit, to his serious loss and detriment.

Wherefore he prayed for judgment for £10 and costs.

The defendant excepted to the summons on the grounds, *inter alia*, that it was vague, informal, and embarrassing, that distribution of water was in dispute, and therefore the Court had no jurisdiction.

The defendant pleaded (in case the exceptions should be overruled) that the plaintiff had no transfer or legal title.

That the clause in the award had reference to proprietors only.

That plaintiff was not a legal proprietor, and therefore was not entitled to bring the action.

That one Olivier held transfer of that portion of the defined share in Lot A referred to in plaintiff's summons, a portion whereof he sold to plaintiff, but passed no transfer retaining the remainder and that therefore Olivier should have been joined in the action.

The Magistrate overruled the exceptions, and gave judgment for the plaintiff for £4 with costs. From this judgment the present appeal was brought.

Mr. Searle, in support of the appeal, contended that a question of servitude over the land was in issue, that future rights were bound, and that the Magistrate had no jurisdiction. The action was of a quasi-criminal nature and for a penalty. No attempt had been made to assess any damages.

The Chief Justice remarked that the Court which made the award of rule of Court must have done so *per incuriam*, the penal clause could not have been brought to the notice of the Court.

Mr. Searle observed that the award was made a rule of Court on circuit in 1869 or 1870. Continuing counsel urged that if the plaintiff stood on the award he was clearly out of court. The following cases were referred to: "Cape Town Council v. Linder and Others," 6 Juta, 410,

Myburg and Others v. Cloete, 8 Menz., 564 and "Van der Byl v. Myburg, 2 Juta, 77."

(In the course of the argument Mr. Justice Upington observed that the case showed the mistake made by country agents in confining themselves to objections instead of going into the merits of the case.)

Mr. Juta, for the respondent, contended that in actions on tort, such as the present, no proof of special damage need be given. The clause in the award was not penal, and was the ordinary clause inserted in awards of a similar nature to the present. The award had been made a rule of Court, and the plaintiff stood by that judgment.

The Chief Justice strongly animadverted on the want of courtesy shown by some agents towards magistrates; giving, as an instance, the letter written by appellant's agent in the present case to the Magistrate with reference to forwarding the records to the Registrar of the Supreme Court.

The Chief Justice, in giving judgment, said that the action in the Magistrate's Court was founded on an award an extract of which was as follows: "We order, adjudge, and award that any proprietor who shall lead water out of any of the watercourses out of his turn of water leading, or who shall fail to secure his damming places and other outlets so that the water shall escape on to his land during the turn of any other proprietor, or who shall knowingly suffer or permit the water to escape on to his lands during the turn of any other proprietor, or who shall divert the stream of water for domestic purposes, or who shall wash in or soil, or permit any washing in or soiling of the water in the watercourse, shall upon conviction be liable for every such offence to a fine not exceeding £10 sterling or less than £1 sterling." Now the words conviction, offence, and fine clearly indicated a penalty and not liquidated damages. In a contract where a penalty was provided for a breach, the person seeking to enforce the penalty must give proof of damage. In the present case no proof of damage was given, and in the absence of such proof the Magistrate should have given absolution from the instance. The judgment of the Magistrate would consequently be altered to one of absolution from the instance, each party to pay his own costs. As the appellant had, however, substantially succeeded, she would have the costs of the appeal.

[Appellants' Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] 10th April, 1892.

REGINA V. JACOB LEPAL.

Theft—Continuous crime—*Peregrinus*—Sentence—Review—Point reserved.

Where a foreigner commits theft beyond the borders of the Colony, and brings the stolen property within the Colony, the principle that theft is a continuous crime applies so as to constitute an offence punishable by the Court exercising jurisdiction where the thief is found. Queen v. Philander Jacobs, Buch., 1876, p. 171, followed.

Mr. Giddy appeared for the Crown and Mr. Watermeyer for the prisoner.

This case came on for argument on a point reserved by the Judge-President of the High Court of Griqualand West.

The prisoner was arrested in the district of Barkly West, and a preparatory examination taken by the Resident Magistrate of Barkly West on a charge of theft. The Acting Crown Prosecutor remitted the case for trial under Act 43 of 1885. The prisoner was then tried and convicted by the Resident Magistrate on a charge of theft, "In that in the month of March, 1892, and at Phokwani, in British Bechuanaland, the said Jacob Lepal did wrongfully and unlawfully steal thirteen sheep, the property, or in the lawful possession, of Andries Gasiboni, a native farmer there residing, which sheep the said Jacob Lepal subsequently conveyed to Shaling Location, in the district of Barkly West, and thus committed the crime of theft there."

On review and after argument in the High Court, the Judge-President reserved the following question for the consideration of the Supreme Court: "Whether in the case of a foreigner stealing property beyond the borders of the Colony and bringing the stolen property within the Colony, the principle that theft is a continuous crime applies, so as to constitute an offence punishable by the Court exercising jurisdiction where the prisoner is found."

Mr. Watermeyer: This case only differs from that of "Queen v. Philander Jacobs," Buch., 1876, p. 171, in two points. Jacobs was a native of the Colony and was tried by the Circuit Court of the district where he was resident. This prisoner is admittedly a foreigner and was tried in the

Magistrate's Court. On the question of jurisdiction, counsel referred to *Ma theus de Criminibus*, 48, 18, 5, 8. Resident Magistrates' Courts are established by statute and their jurisdiction is given them by those statutes. The following authorities were referred to: "*Regina v. Prowes*," 1 Moo. C.C., 849; "*Rex v. Madge*," 9 Car. and P., p. 29; Bishop's Criminal Law, sections 187-141. The words of the charge do not allege that the prisoner conveyed the goods into Barkly West unlawfully.

The Court: The question depends on the definition of theft.

Mr. Giddy was not called on.

The Chief Justice, in giving judgment, said the only points which distinguish this case from that of Philander Jacobs are, first, that Jacobs was tried at the Circuit Court, whereas in the present case the prisoner was tried by the Resident Magistrate; and secondly, that Jacobs was an inhabitant of the Colony, whereas Lepal was not. Towards the end of his judgment in the case of Jacobs he (the Chief Justice) said that he did not express any opinion as to what the judgment of the Court would have been if the prisoner had been a foreigner, instead of being an inhabitant of this colony. These remarks applied to the previous argument of counsel. In his (the Chief Justice's) opinion the fact that the prisoner in the present case was not an inhabitant of the Colony made no difference. The question was, had the crime of theft been committed? Whether a magistrate or the Circuit Court tried the case, in his opinion made no difference. He did not wish to add to the remarks which he had made in the case of Philander Jacobs, that case had been very well argued on both sides. The present case had also been ably argued by Mr. Watermeyer, but there was no occasion to hear Mr. Giddy. The point reserved would be decided against the prisoner.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G., (Chief Justice), Mr Justice BUCHANAN, and Mr Justice UPINGTON, K.C.M.G.] { 18th June, 1892.

LIND AND OTHERS V. CALITZ AND OTHERS.

Ejectment—Action—Damages—Will—Construction—*Fidei-commissum*—Prohibition against alienation until second generation—Insolvency—Sale—*Bona-fide* possessors—Compensation for improvements.

Mr. Searle and Mr. Tredgold appeared for the plaintiffs, and Mr. Schreiner, Q.C., and Mr. Joubert for the defendants.

This was an action for a decree of ejectment, and for £50 damages and costs of suit. The declaration was as follows: The plaintiffs, Christian Michael Lind, John Tregunne King, Philippus Johannes Antonie Meiring, and Petrus J. Trytseman, are the registered owners, together with the defendant Jan Petrus Stephanus Calitz, of the lots or portions of the farm Warmwater, in the division of Oudtshoorn, hereinafter mentioned, namely: (a) Lot marked HH, in extent 282 morgen and 440 square reeds; (b) lot marked La A, in extent 162 morgen and 280 square reeds; (c) lot marked La N, in extent 175 morgen and 80 square reeds; (d) lot marked La G, in extent 54 morgen and 870 square reeds.

2. The said Meiring is registered owner of one-half share in all the said lots or portions of Warmwater, and the other plaintiffs, together with the defendant Jan Petrus Stephanus Calitz, are the registered owners of the other half, in which they respectively hold and possess the fractional parts following, that is to say: The said Lind owns the half-share of lot La A; the said King owns one-half share in lots HH and G; the said Trytseman owns one-fourth share of lot La N; and the said Calitz owns the remaining one-fourth share of lot La N.

3. The one-half share in the above-mentioned property was, in or about 1878, sold by one Hendrik Everhardus Grundling, then registered owner of the whole property, to one Matthys Christian Calitz, who was married in community of property to a daughter of the said H. E. Grundling; and the other half of the said property was about the same time sold by the said H. E. Grundling to the said Philippus Johannes Antonie Meiring; the said sales were completed by written agreement.

4. Under the said agreement the purchase price of £800 was to be paid into the joint estate of the said Grundling and his wife at the survivor's death, at which date transfer was to be passed to the purchaser. Similar provisions were made in respect of the sales to Meiring.

5. After the completion of the said sales, in or about 1881, the said Grundling and his wife made a joint will, and *inter alia* they purported to bequeath the said property to the said Calitz and the said Meiring upon condition that they should have no right to sell until the second generation; for the terms of the said will, which is filed in the Master's Office, the plaintiffs claim leave to refer thereto.

6. In or about 1884 the said Calitz died, and in 1885 his executors surrendered his estate as insolvent, and a trustee was duly appointed thereto. In or about the year 1886 the wife of H. E.

Grundling died, and the executor appointed by the will above referred to transferred to the said trustee, in or about October, 1891, the share purchased as aforesaid by the said Calitz, in terms of the deed of sale, and also transferred to the said Meiring the property purchased by him under the deed of sale.

7. In or about May, 1891, the trustee in the insolvent estate of the said Calitz sold by public auction, subject to confirmation by creditors, all the right, title, and interest of the said Calitz in the property purchased by him as aforesaid, and thereafter the said sale was confirmed by the creditors; the said King purchased at the public auction.

8. Thereafter the said property was transferred by the trustee to the said King, and through the said King the other plaintiffs, and the defendant Jan Petrus Stephanus Calitz, derive their title by purchase and transfer.

9. The defendants are the wife and children of the said Calitz, and remain in possession of the property sold and transferred to the plaintiffs as aforesaid, and refuse to give up possession to the plaintiffs, although they have been duly warned so to do. The defendant Susara Johanna Calitz (born Grundling) is married without community of property to Andries Hercules Terblans, and is assisted by him as far as need be.

10. The plaintiffs contend that the property having been sold by the said H. E. Grundling, and transferred by his executor as aforesaid to the trustee of the said Calitz and to the said Meiring, and by the said trustee to the said King, and thereafter to the plaintiffs, the defendants have no right to remain in possession thereof, and that in no case, even if there was no sale, can the defendants now seek to retain possession of the said property under the terms of the will of the said H. E. Grundling as against the plaintiffs.

The defendants by their wrongful conduct above referred to, in refusing to quit the said property and deliver up possession to the plaintiffs, have become liable to pay to the plaintiffs £50 sterling as damages sustained by the plaintiffs.

The plaintiffs claim: (a) A decree of ejectment against the defendants; (b) the sum of £50 as damages; (c) such further relief as may seem meet; (d) costs of suit.

I. For a plea to the declaration, the defendants say as follows:

1. They admit the allegations in paragraphs 1 and 2 of the declaration, and say that the plaintiff Meiring owns an undivided one half share in the lots or portion of Warmwater therein referred to.

2. As to paragraph 3, they say that in 1878 H. E. Grundling was the registered proprietor of certain undivided shares in the said farm, to wit one-ninth, one-ninth, and one-thirtieth, and in that year he agreed in writing to sell to the said

Matthys Christian Calitz, then married with community of goods to the defendant Susara Johanna Calitz, and to the plaintiff Meiring, each one-ninth undivided share of the said farm for the price in each case of £300, and they deny the other allegations in the said paragraph.

3. The whole farm was in 1886, after H. E. Grundling's death, sub-divided among the proprietors, and his executor received sub-divisional transfer of certain lots or portions, to wit: Lots OC, HH, WW, A, G, N, L, of the said farm as representing the undivided shares of one-ninth, one-ninth, and one-thirtieth aforesaid.

4. As to paragraph 4, they crave leave to refer to the written agreement when produced. They admit the allegations in paragraph 5 of the declaration, but say that the aforesaid sale in 1878 to the late Matthys Christian Calitz and the plaintiff Meiring, together with other sales of part of his landed property agreed upon between H. E. Grundling and other of his children were thereafter cancelled by mutual consent, as the plaintiffs well know.

5. By their joint will H. E. Grundling and his wife in 1881 bequeathed among their eleven children and heirs, including the defendant Susara Calitz and the wife of the plaintiff Meiring, their landed property in certain shares, in each case for a price or sum of £300 sterling, the said bequests being subject to a life interest in favour of the survivor.

6. In 1881 H. E. Grundling died and the survivor died in 1886, having by her last will and testament released the eleven children and heirs from the payment of the several sums of £300 sterling imposed by the will.

7. The late Matthys Christian Calitz and the plaintiff Meiring during the lifetime of the surviving testatrix, and with her consent, had possession of certain defined portions of the farm Warmwater, as representing the shares bequeathed as aforesaid respectively to the wives of the said Calitz and of the plaintiff Meiring, subject to the terms of the said will, by which it is provided that all heirs shall have no right under the will to sell until the second generation.

8. By the said will, according to the true meaning and intent of the testator and testatrix, a *fidei commissum* was imposed upon each of the children or heirs in favour of their children, to wit, the grandchildren of the testator and testatrix.

9. The defendants (other than Susara Johanna Calitz) are six of the eleven children of the late Matthys Christian Calitz, the other children being still minors under age.

10. The late Matthys Christian Calitz, during his lifetime, in derogation of his rights, and as he lawfully might do, allotted out of the defined portions of the said farm, possessed by him as aforesaid, certain defined portions to his sons, the

defendants Matthys, Hendrik, Jan, and Johannes, as their shares in the land bequeathed by H. E. Grundling and his wife as aforesaid, and after the death of the late Matthys Christian Calitz, his widow (the defendant Susara Johanna Calitz), as she lawfully might do, allotted to her other two sons, the defendants Cornelis and Frederiek Calitz, certain other defined portions as their share as aforesaid.

11. The said late Matthys Christian Calitz and his said widow reserved to themselves as against each of their said sons a right to receive one-third of the produce of the portion of land so allotted, and the said six defendants entered and took, and now have quiet and lawful possession of the shares so bequeathed and allotted to them, and cultivated and improved the same, and all of them save Frederiek erected buildings on their shares, but Frederiek resided and still resides with his mother, their co-defendant.

12. The permanent improvements by building and cultivation effected by the said defendants are of value as follows: Matthys Christian Calitz, £120; Hendrik Everhardus Calitz, £76; Jan Petrus Stephanus Calitz, £115; Johannes Calitz, £46; Cornelis Calitz, £96; Frederiek Calitz (by cultivation only), £10.

13. None of the defendants are in possession of any part of the said farm, to the possession of which the plaintiff Meiring can lay claim by virtue of his interest in a share of the said farm in terms of the will, but the said Meiring has possession of defined though not divided portions of lots HH, A, N, and G aforesaid, without disturbance from the defendants, against whom he has no lawful grounds of complaint.

14. At the time of the death of the late Matthys Christian Calitz in 1884, no transfer had been passed to his wife of the share bequeathed to him by H. E. Grundling and his wife, but in December, 1891, transfer was passed of lots HH, A, N, and G to the trustees of the said Calitz out of the estate of the said Grundling, under a power of attorney obtained by the plaintiff Lind on the 3rd day of August, 1891, from one Andries Grundling, then the executor of H. E. Grundling.

15. The said Lind, acting as agent for the trustees, represented to the said Grundling that so soon as the said transfer was completed to the said trustees, he (Lind) would give notice to the defendant Matthys Christian Calitz, and his brothers and co-defendants, to release the said deed with a view to their taking transfer themselves of their share in the said lots HH, A, N, and G.

16. The said trustees were not entitled in respect of the said farm, and could not claim in law to obtain any rights save such as remained to the defendant Susara Johanna Calitz, at the time of the surrender of her late husband's estate and

subject always to the terms of the aforesaid will of H. E. Grundling and his wife, but under the said power of attorney granted by the executor of H. E. Grundling upon such representations as aforesaid the trustees wrongfully and unlawfully obtained, in fraud of the rights of the children of Susara Johanna Calitz, a transfer purporting to be made pursuant to the sale agreed upon in 1878, but afterwards cancelled as aforesaid.

17. The said Lind was at the time the said transfer was so obtained well aware of the provisions of the said will, and of the nature of the then and still existing occupation by the defendants of the portions of the said farm bequeathed as aforesaid.

18. In the month of May, 1891, the said trustees of the late Matthys Christian Calitz, who had previously endeavoured to sell the life interest of the defendant Susara Johanna Calitz, wrongfully, unlawfully, and in fraud of the rights of the children of the said late Matthys Christian Calitz, instructed their agent, the plaintiff Lind, as auctioneer, to sell by public auction the one-half part or share of the lots HH, A, N, and G, which were thereafter transferred to them as aforesaid.

19. The defendant Matthys Christian Calitz, at the said sale, attended and protested both to the said Lind and the plaintiff King against the sale of the said lots, but the said lots were, notwithstanding his protest, knocked down for £80, and thereafter declared sold to the said King, and transferred to him by the said trustees, and subsequently parts thereof were transferred to the plaintiff Lind also in December, 1891.

20. It is a special condition of the transfer from the trustees to the said King that the latter indemnifies the trustees from costs of any action or actions that may be instituted, and holds them harmless, and the said King and Lind obtained their respective transfers with full knowledge of the rights of the children of the late Matthys Christian Calitz under the will aforesaid.

21. The said Trytaman has been and is lessee and in possession of the portion of the said farm now in his occupation from his brother, Daniel Trytaman, married to Maria Calitz, to whom, as one of the *fidei commissum* heirs, the late Matthys Christian Calitz allotted the said portion in manner set forth in paragraph 10 hereof, and the said Trytaman purchased and obtained transfer from the plaintiff Lind of one-fourth share of lot N, with full knowledge of the premises.

22. The defendant Jan Petrus Stephanus Calitz admits that he purchased from the plaintiff Lind one-fourth share of lot N with full knowledge of the premises, and to confirm his possession of the portion allotted to him by his father, as stated in paragraph 10, whereof he remains in peaceful and lawful possession as aforesaid.

23. The titles of the plaintiff Lind, King, and

Trytman are by reason of the premises null and void, and the children of the late Matthys Christian Calitz entitled to a *restitutio in integrum* on the ground of fraud.

24. Or otherwise, if this honourable Court should hold that the said children are not entitled to a *restitutio in integrum* as aforesaid, the defendants, who are sons of the late Matthys Christian Calitz, are entitled to hold quiet and peaceable possession as against the plaintiffs of the portions now possessed by them, and bequeathed to and cultivated and improved by them as aforesaid, and the defendant Susara Johanna Calitz (now married without community of goods to, and duly assisted by, Andries Hercules Terblans) as surviving spouse of the insolvent Matthys Christian Calitz, in that event submits herself to such order as the honourable Court may make in this suit with regard to her life interest in and possession of so much of the said farm as she possesses.

25. Save as aforesaid, the defendants deny the allegations in paragraphs 6, 7, 8, 9, and 10 of the declaration.

Wherefore the defendants pray that the plaintiffs' claim may be dismissed with costs.

II. And for a claim in reconvention, the defendants (now plaintiffs) say as follows:

1. They crave leave to refer to the several matters and things set forth in the above plea.

Wherefore they pray for an order declaring that they are entitled against the plaintiffs (now defendants) Lind, King, and Trytman, to a *restitutio in integrum* on the ground of fraud, and that the titles and deeds of transfer held by the plaintiffs (now defendants) are null and void, and must be surrendered for cancellation accordingly, or that this honourable Court may grant such further or other relief in the premises as shall seem meet, together with costs of suit.

The replication was general, and upon these pleadings issue was joined.

Mr. Schreiner called

Matthys Christiaan Calitz, who deposed that he was son of the late Matthys Christian Calitz, who was married to Susara Johanna Grundling. His mother, on the death of Calitz, was re-married to one Terblans, and still resided at Warmwater. He had lived on the farm since he was fifteen years of age. His father and Meiring had shares in the farm. His grandfather died in 1884, and his father gave him a portion of the farm for working on it. He made several improvements on the place, by building a house, planting a vineyard, and so forth. His brothers also made various improvements. Before his death his grandfather said, "Children, I have looked after your interests," referring to his will. Both his mother and father were satisfied with the terms of the will. Between 1891 and 1896 his father paid

Mrs Grundling £18 per annum, and afterwards £9. Since his grandfather's death he had always used the place as his own. He had to give one-third of the proceeds of his produce to his mother. His brothers, Johannes Petrus, Johannes, Hendrik Everhardus, and Cornelia, also had shares from his father to work. In 1891 a claim was made to his land, whereupon he went to the executor, Andries Ignatius Grundling, who told him to rest satisfied, as the property could not be touched according to the terms of the will. He attended the sale in 1891—Lind being the auctioneer—he protested against the sale, and stopped the bidding. He asked Lind whom he was selling for, and he replied for the trustees, McIntyre and Lind. The bidding then proceeded, and the property was knocked down to King for £64. Neither witness nor any of his relatives took part in the bidding. The one-ninth share of Warmwater was worth £8,000 to the children. Lind got a portion of the ground, some of which he sold to his brother Johannes and some to Trytman, each for £200. The children raised an objection to Trytman taking possession of the property. He computed the improvements he had made at £180, and the value of his ground at £230. The land was very fertile; a small portion would suffice to allow a person to get a livelihood. His brother Johannes Petrus made improvements to the value of £75, Johannes to £40, and Cornelia to £25.

Cross-examined: There was a cancellation of the sale to his father, but he was not present when the transaction took place. A couple of years before her death he entered into a lease with his grandmother. His brothers took steps in October last to obtain an interdict to prevent the transfer going through. His father told him and the other children, while they were one day driving, that the sale had been cancelled, and that the property was now bequeathed to them under the will. A few days afterwards his grandfather came over, and said he had safe-guarded the interests of the children; he was on the farm about a fortnight before he died.

Hendrik Everhardus Meiring deposed that he was a grandson of the late H. B. Grundling. There was a large family gathering at the time the will was drawn up. He was himself present. Old Grundling said he was going to cancel the sale to Matthys Calitz and his father, and put the ground in the will. All present expressed themselves satisfied with the terms of the will. His father held undisputed possession of the ground so far as the Calitzes were concerned.

Re-examined: He knew that his father had acquired the property under the sale of 1878, and he paid a certain sum annually to the Grundlings for the portion of Warmwater he held. He saw the will signed and witnessed.

Jacobus Johannes Grundling deposed that he was son of the testator, and was one of the executors in the estate of his widow. He was one of the legatees of the immovable property under his father's will. He did buy four morgen of ground from his father for £100, but the property bequeathed to him was to be bought in for £800. When his father's will was made he was present among many others. His father said that the sale must be cancelled, and the ground passed over to the grandchildren. When Lind sold the property he attended the sale, and remembered Calitz handing the auctioneer a letter forbidding the sale. Lind urged the Calitzes to buy the property before he put it up to auction. He knew that Meiring took transfer in terms of the deed of sale of 1878.

Cross-examined: He was aware that his mother got so much per annum from Matthys Calitz and Meiring after her first husband's death. The last couple of years they paid £9; before that they paid £18 per annum.

Cornelius Jacobus Grundling deposed that he was a son of the late H. E. Grundling, and heir under the will. During his lifetime he never bought any land from his father, as he got a share under the will. He was present when the will was made. His father asked the purchasers if they were willing that the property should be transferred to the heirs, and they said yes.

Hendrik Calitz, second son of Matthys Calitz, sen., deposed to hearing his grandfather say that he had withdrawn the sale of the ground, and had made a will which would establish the heirs as masters. When he got his share the ground was bare; he built a house, and cultivated his portion. He looked upon the ground, with the improvements he had made, as worth £425. He had always to contribute one-third of his produce to his mother during her lifetime. His brothers—Matthys, Johannes, Johannes Petrus, and Cornelis—had also made improvements.

Johannes Petrus Calitz deposed that he purchased a portion of the land from Lind, which he had obtained from King, and paid £200. His father told his mother in his presence that the original sale had been cancelled.

Cross-examined: He first offered to lease the ground; but on being told there were other persons after it he agreed to purchase it.

Johannes Jacobus Calitz deposed that he was present when the will was signed. All the children were present except two sons-in-law. The will was read out, and his grandfather, Grundling, said that he had cancelled the sale, and that the ground would revert to his grandchildren. He estimated the improvements he had made on his share at £50. He went over to Becker, at Ladismith, with a power of attorney to stop transfer being made to King.

Cross-examined: After the death of Grundling, sen., his father paid £9 per annum, and previous to that £18.

By the Court: He could not explain why his father did not, on the occasion of the making of the will, destroy the deed of sale and purchase. It was not to be found at the time.

Mr. Schreiner said that two of his important witnesses—Mr. Nortje and Mrs. Terblans—had not arrived, and if the Court would allow him he would put in documentary evidence and bring those witnesses forward to-morrow.

Mr. J. J. King (examined by Mr. Searle) stated that he was well acquainted with the farm Warmwater. He owned a portion of the farm, and lived on it for twelve years. He was formerly in the employment of old Mr Grundling. He knew of sales in 1872 from both the purchasers. He knew of conditions of sale. The purchasers were living on portions of the farm which were sold to them. He formerly kept a shop on Warmwater. Calitz told him the rate of interest he had to pay. He did not know if Calitz paid interest after Grundling's death. At the sale in 1891, Matthys Christian Calitz said he had a letter from the executor that the property was not to be sold, and protested against the sale. The property was knocked down to witness for £60. In addition to this sum he paid £6 for the grazing rights, £100 to the Standard Bank, and £70 odd in connection with sub-divisional transfer duty and costs of arbitration. Subsequent transfer duty was paid after consultation with the Civil Commissioner. The Standard Bank was the only creditor present at the meeting when the sale was confirmed.

The Chief Justice: The £106 belonged to the estate, and ought to have been distributed amongst all the creditors if the Standard Bank had no preference.

Witness afterwards sold half of the property to Lind. Witness knew of other sales effected by old Mr Grundling to his sons-in-law in 1878. The improvements made on the farm were of little value to witness, and might be fairly estimated at under £200.

Cross-examined: Lind paid the subsequent transfer duty, witness did not know on what date. He paid the purchase price, including the £100 and £70 odd, to Lind in a lump sum of over £200. The subsequent sale of the property to Lind for £126 might be regarded as a bargain. Witness first heard of the cancellation of the sale after the 22nd May, 1891. He thought the document given to Lind was signed after the meeting. Witness could not say whether Lind was acting for the trustees at the meeting. He knew that the farm was being sold in the estate of Calitz. Mr. Savory, the manager of the Standard Bank, said nothing at the meeting about the insufficiency of the purchase price. Lind and Savory mentioned

that the £100 should be paid to the Standard Bank. Lind told him that he would have to pay all the creditors in the estate of Calitz. He was not now prepared to pay them; they should have sent in their claims before. He first conceived the idea of buying the land at the sale. He left the farm Warmwater in 1876.

Re-examined: He had frequently been on the farm since 1876. He first heard of the cancellation of the sale from his son. No valuable fencing had been done on the farm.

Mr. O. M. Lind, attorney-at-law, practising at Oudtshoorn, deposed that in 1886 Mr. McIntyre and he were in partnership, but that the partnership was dissolved in 1888. Witness had nothing to do with the estate of Calitz during the partnership.

By the Court: Nel was not his partner then. He put up the land for sale in August, 1889, and again in May, 1891. Before the property was offered for sale in 1889 counsel's opinion was taken in the matter. Witness told Matthys Calitz before the sale that the property must be sold and the estate closed. Calitz said he was not going to buy his own property. Calitz said he had a letter from the executor to protest against the sale, but witness did not see it. The meeting of creditors, at which the £100 was awarded to the Standard Bank, had been advertised. He was present at the meeting as agent for the trustees and representing the Standard Bank. He only recently heard of the cancellation of the sale. Witness clearly explained to the executor, in the presence of Mr. Attorney Foster, what he was doing before he signed the power to pass transfer. He agreed with Mr. King that the improvements on the farm were not worth more than £20.

Messrs. J. A. Foster and John Cairncross also gave evidence, and the further hearing of the case was adjourned.

Postea (June 14).

The further hearing of this case was resumed, when the first witnesses called was

Susara Johanna Terblans, who deposed that she was widow of the late Matthys Calitz, and was now married to Terblans. She lived on Warmwater, which was the property of her father, H. E. Grundling, who sold a portion of the farm to her first husband. She remembered her father making a will. Before that the sale was cancelled, so she was informed by her husband. She was dissatisfied with the sale, because her husband was a spendthrift. There were twelve children by the marriage. Her father gave the elder sons portions of the farm. They were all in possession now, and had built houses and cultivated what was formerly bare ground. Petrus Trytaman,

who married her daughter Maria, also had a portion of the farm. She never saw the deed of sale. After her first husband's death she gave up his estate, and all the papers connected with it.

Cross-examined: The signature on the deed of sale produced was that of her first husband, Matthys Calitz. For many years her husband paid £18 per annum to Grundling. Nothing was ever paid off the purchase price of the land. Her father told her that all the sales had been cancelled.

Philippus Johannes Antonie Meiring deposed that he was a son-in-law of H. E. Grundling, and had lived on Warmwater for thirty-three years. The sale of ground to him was never cancelled; he got transfer on the 31st August of last year on terms of the sale. He knew Matthys Calitz, sen., who lived close to him. They were both pleased with the sales of the land. He was present when the will was drawn up, but nothing was said then concerning the cancellation of the sales. He first heard that the sales were cancelled since the present action was instituted.

Cross-examined: He got his transfer through the agency of Lind. He was present at the sale when Lind sold Calitz's portion of Warmwater.

Gerhardus Johannes Terblans deposed that he was a son-in-law of the late H. E. Grundling. He remembered the sale to Calitz; he knew that he paid interest yearly. He never heard anything about the cancellation of the sales until recently.

Mr. Henry K. Tredgold gave formal evidence as to finding the documents of sale with the other papers relating to the estate of which his partner Mr. McIntyre was one of the trustees.

The Chief Justice intimated that it would be as well for the argument to be confined to the construction of the will.

Mr. Searle addressed himself to this particular point, and contended that no *fidei commissum* had been created in favour of the grandchildren. The intention clearly was that after the death of the surviving spouse the property could be sold. The prohibition was purely personal, and merely marked the period of time during which the sale was prohibited. There was no vesting; there was no gift over. Counsel referred to the following authorities: "Hiddingh's Trustee v. The Colonial Orphan Chamber," 2 Juta, 278; "Drew v. Drew's Executor," Bush, 1876, p. 208; Hugo's case (not yet reported); *In re Naude's petition*, 1 C.T.L.R., 282; Voet, 37, 1, 27 Burge, vol. II. p. 118; "Du Plessis v. Smallberger," 8 Searle, 885.

Mr. Schreiner urged that the persons in whose favour the *fidei commissum* had been constituted were sufficiently indicated. The words in the will, "tot in die tweede gelid," were equivalent to *ne extra familiam*. Counsel referred to *Naude, De prohib. alien.*, 8, 1, 4, p. 45, and para. III, cap. 2, sec. 9, and on the subject of compensation to

"Bellingham v. Blommetje," Buch., 1874, p. 86.

The Chief Justice, in giving judgment said it was highly to be regretted that some arrangement could not have been come to before expenses were incurred on the question of the true construction of the will, because after a careful consideration of the matter he had come to the conclusion that no *fidei commissum* had been created by the will in favour of the children. The words in the will were to the effect that the heirs should not have the right to sell until the second generation. If these words showed that a prohibition was intended by the testator in favour of two generations, then no doubt they would imply a *fidei commissum*, but the wording of the will did not imply such a result. It was to the point of time rather than in favour of the second generation that the prohibition was made. That being the Court's opinion of the construction of the will, it became unnecessary to decide, for the purposes of this case, the important question whether or not the sale had been cancelled by mutual consent. At the same time, he felt bound to express his individual opinion on the point. In his opinion the defendants had clearly proved such cancellation; as the evidence of the witnesses satisfied him that, when all the family were gathered round the bedside of the old man in his last days, it was clearly arranged that, so far at least as Calitz was concerned, the sale was to be cancelled, and that the children were to have certain rights. Unfortunately when the old man came to draw up his will he did not use the requisite language to give effect to his intention. The Court was bound to come to the conclusion that the language of the will did not create a *fidei commissum* in favour of the children. Now came the question of compensation. He had already pointed out in the course of the argument that the children who had made improvements did so in the firm belief that they were entitled to the land. If, therefore, Mrs Calitz had attempted during her lifetime to eject the children they would have been entitled to compensation for improvements. The trustees had certainly no greater rights than the insolvent. If she could not have ejected them without compensation the trustees had no greater power. As regarded the three sons, Mathias, Hendrik Everhardus, and Johannes Calitz, they were entitled to compensation in the respective sums of £100, £50, and £30. In respect to them, therefore, judgment would be that they give up possession upon payment of these respective sums. The purchasers were all aware of the improvements that had been made by the sons, and the least they could have done was to have tendered compensation for such improvements. In the absence of any such tender, the Court was of opinion that these three defendants

were entitled to their costs as against the plaintiffs. As regards the other defendants, with the exception of Jan Petrus Stephanus Calitz, the plaintiffs were entitled to judgment against them with costs, but in these costs were not to be included any expenses incurred for the purpose of disproving the cancellation of the sale. As to Jan Petrus Stephanus Calitz, he was clearly entitled to judgment with costs, because he was the registered owners of the property, and the plaintiffs had no right to seek to eject him.

At the conclusion of his judgment, the Chief Justice, in strong terms, commented upon the general administration of the estate of Calitz, and intimated that he hoped the £100 agreed to be paid to the Standard Bank would not be handed over to that institution, but would be divided *pro rata* amongst the creditors of the estate.

[Plaintiffs' Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendants' Attorney, C. O. de Villiers.]

DAWSON V. DAWSON.

Mr. Sheil, on behalf of the plaintiff, moved for leave to sue by edictal citation in an action against defendant for restitution of conjugal rights, failing which for divorce on the grounds of malicious desertion.

Leave was granted, and the citation made returnable on the 1st August.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, {
K.C.M.G. (Chief Justice). Mr. { 14th June,
Justice BUCHANAN, and Mr. { 1892.
Justice UPINGTON, K.C.M.G.}]

PROVISIONAL ROLL.

VAN STAVEREN V. BAIN.

Mr. McLachlan moved for a decree of civil imprisonment against the defendant on an unsatisfied judgment of £14 7s 8d, and £1 6s. 8d. costs. Service was effected by the Deputy Sheriff of Kimberley by leaving a copy of the summons and the writ of execution with one Annie Brewer, the defendant's landlady, at his last known place of residence, a boarding-house. The Deputy Sheriff reported to the High Sheriff that the landlady had informed him that she was not aware whether the defendant would return or not.

The High Sheriff now asked for the ruling of the Court as to whether the service was good, and

referred to the case of "The Union Bank v. Huntley" (31st May, 1889; not reported), in which the Court held that a copy of the summons left with the proprietress of the hotel in which the defendant had been residing for a few days was not sufficient service, and that personal service should be effected upon the defendant in Kimberley, his usual place of residence.

In the present case the Court considered that the return of the Deputy Sheriff was sufficient, and held that the service was good. Decree granted as prayed.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 14th June,
Justice BUCHANAN, and Mr. 1892.
Justice UPINGTON, K.C.M.G.]

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted:

Willem Smit, jun., Richard John Cogoo, Joseph Frederik Goedhals, Jeremiah Thomas, Christian Frederick Beyers, Hendrik Albertyn Louw August Linnow, and Duncan McDonald.

CORBEAU V. CORBEAU.

Mr. McLachlan for plaintiff; defendant in default. This was an action for the restitution of conjugal rights.

Henry Corbeau, the plaintiff, deposed that he was a storekeeper and trader residing at Pella, in Namaqualand. He was married on the 25th January, 1858, at Caledon. In 1864, while he was away on a trading expedition, his wife deserted her home, and had not since returned. There were no children by the marriage.

By the Court: He was not aware that his wife had made application to the Court for leave to part with certain property without his consent. He could not remember where he was in 1866. He gave up trading for some time, but he declined to state the reason. It was correct that he had been a convict. He had never offered to take his wife back after his release, and did not care to receive her now. If the Court made the order for the restitution of conjugal rights, he was not inclined to receive her.

The Chief Justice: Very well then, that disposes of the matter. The order is refused.

[Plaintiff's Attorney, H. P. du Preez]

PETITION OF ALFRED JOHN GHISLIN.

Mr. Graham moved for authority to the Registrar of Deeds to cancel a certain mortgage bond passed by the petitioner and Theodor William Ghislin, since deceased, on the 20th September, 1880, in favour of the South African Association for £166 18s. 4d, hypothecating a piece of land at Mostert's Bay, the said bond having been duly paid, but since lost or mislaid.

The Court authorised the cancellation of the bond.

WEYTZE V. WEYTZE.

On the application of Mr. McLachlan, the rule nisi in this matter was made absolute.

BONITO V. BONITO.

Mr. McLachlan mentioned this case (an action for divorce), in which a rule nisi had been granted calling upon the defendant to show cause why plaintiff should not be allowed to sue in *forma pauperis*.

Personal service had been ordered, and failing this publication in the *Government Gazette* and in the *Delagoa Bay Government Gazette*.

There being no *Government Gazette* published in Delagoa Bay, counsel now asked for directions as to publication.

The Court declined to give any direction until a return had been made as to whether personal service could be effected.

THOMAS V. THOMAS.

Mr. McLachlan applied for the rule nisi to be made absolute.—Order granted.

In re TEMPLE.

On the motion of Mr. Graham, Mr. Henry Francis Temple was admitted to practise as an attorney of the Supreme Court; the oath to be taken at Matatiele, Griqualand East, before the Resident Magistrate.

RE CAPE CENTRAL RAILWAYS.

Mr. Schreimer applied for the sanction of the Court to a compromise proposed to be effected by the official liquidators with John Walker, in respect to a call on 8,280 shares in the company.

The Court granted the order.

MANTLE V. MANTLE.

Mr. Castens applied for an order making absolute the rule nisi for the dissolution of the marriage

subsisting between the parties, by reason of the respondent failing to return to or receive his wife, and to give her the custody of the child of the marriage.

The application was granted.

PETITION OF SAMUEL SMART.

Mr. Graham applied for an order authorising the Registrar of Deeds to cancel a certain mortgage bond for £40, passed by the petitioner in favour of Charles Fanning on the 2nd June, 1864, hypothecating a certain lot of ground marked No. 97, at Zonnebloem, such bond having been duly paid.

The order was granted.

SOUTH AFRICAN ASSOCIATION V. VAN STADEN.

Law-agent — Charges for attending commission *de bene esse*—Refusal of Taxing Master to tax—Costs of application—Practice.

Application should be made for the charges of a law-agent employed by parties to a suit at the trial and not subsequently.

Mr. Juta appeared for the applicants, and Mr. Searle for the respondent.

Mr. Juta moved for an order allowing to the local agent of the plaintiff in the said suit his reasonable costs and charges in respect to the commission *de bene esse*, applied for on behalf of defendant, and to which plaintiffs consented.

Mr. Searle contended that the application should have been made at the trial, and referred to the 205th and 206th rules of Court, and to the case of "Cilliers v. Pienaar and Wife," 1 C.T.L.R., 201, in which the Court refused to allow an agent his costs.

Mr. Juta: Costs are in the discretion of the Court. We only ask that the Taxing Master should fix a reasonable remuneration. He referred to the 86th, 207th, and 251st rules of Court.

The Chief Justice said he quite agreed with Mr. Searle that an application of this nature should have been made immediately after judgment was given, when the whole case was fresh in the memory of the Court. He was satisfied, in the present case, that if such an application had been made the Court would have directed the Taxing Officer to allow fair remuneration. Such an application was not made, but now the defendant was called upon to show cause why he should not pay the costs of the present application, and to this he naturally objected. In his opinion, the respondent was entitled to his costs for coming to the Court

to oppose the application. An order would be made that the matter be referred to the Taxing Officer to allow such an amount of remuneration as he might deem sufficient; the costs of the application to be paid by the applicants.

COPELAND'S LIQUIDATORS V. COLEMAN.

Mr. Graham applied for an order making absolute a rule nisi for the issue by the Registrar of Deeds of a copy of the mortgage bond for £160, with interest, passed by the respondent in favour of the said Copeland, hypothecating a piece of land called Chantrey, in the district of Maclear.

The order was granted.

DIPPENAAR V. DIPPENAAR.

Mr. McLachlan applied for an order making absolute a rule nisi for the dissolution of the marriage subsisting between the parties by reason of the respondent's failure to obey an order to return to her husband, and for an order giving the plaintiff the custody of the minor child of the marriage.

The order was granted.

BROWN AND CO V. DICKS.

On the application of Mr. Sheil, the return day was extended to the 12th July.

In re INSOLVENT ESTATE OF DUNCAN McDONALD.

Insolvency—Discharge.

The Court granted the rehabilitation of an insolvent, who had not included a life policy in his statement of affairs, upon being satisfied that there was no intention on his part to conceal any of the assets of the estate.

Mr. Watermeyer moved for the rehabilitation of the insolvent.

It appeared from the trustees' report that the insolvent was in the Transvaal, where he at present resides, when his estate was compulsorily sequestrated by an order of Court dated 18th August, 1887, on the application of Mr. Hubertus Effers, of Stellenbosch.

That on their appointment being confirmed the trustees at once addressed a letter to the insolvent requesting him to deliver up his books and any documents pertaining to his estate, also to furnish the trustees with a full statement of his affairs and a memorandum setting forth the causes to which he attributed his insolvency, also calling

upon him to attend the third meeting of his creditors or give his reasons for not doing so.

That the insolvent in reply forwarded his books with a statement of his affairs and also addressed a letter to the trustees setting forth the causes to which he attributed his insolvency, and his reasons for not being present at the third meeting.

(In this letter the insolvent expressed his willingness to attend the third meeting of his creditors, but pointed out that it was impossible for him to do so as he was without funds.)

It further appeared from the report that a life policy for £800 pledged by the insolvent to the South African Loan and Mortgage Agency as security for advances made to him had not been included in his statement of affairs.

Mr. Watermeyer observed that the insolvent had committed a technical breach of the Ordinance by not attending the first meeting of his creditors, but there were special circumstances in the case, the insolvent was in the Transvaal, and without funds necessary to enable him to travel to Cape Town.

The Chief Justice: The most serious charge made against the insolvent is that of not including the life policy in his schedules.

Mr. Watermeyer: No schedules properly so called were filed, only the statement of affairs. The life policy was pledged to the Loan and Mortgage Agency, and the insolvent evidently did not regard it as an asset.

The Court granted the rehabilitation of the insolvent, being of opinion that there had been no intention on his part to conceal any of the assets of his estate.

REGINA V. DAVID FRASER. { 1892.
15th June.

Assault—Grievous bodily harm—Evidence—
Conviction—Resident Magistrate's sentence confirmed on appeal.

Mr. Schreiner appeared for the appellant; Mr. Giddy for the Crown.

This was an appeal from a decision of the Additional Resident Magistrate of Kimberley, sitting at Beaconsfield, in a case in which a preparatory examination had been instituted against the accused, who was charged with assault with intent to do grievous bodily harm. The accused who pleaded not guilty, was committed for trial, but the case was remitted to the Magistrate. The accused thereafter was sentenced to three months' imprisonment and to pay a fine of £25, or a further term of three months' imprisonment in default of the fine being paid. The ground of the appeal was that the verdict was not

in accordance with the evidence. A man named Piet on whom the assault had been committed alleged that he had been struck with a sjambok by the accused, and that the blow caused the loss of his left eye. Counsel remarked that there was no doubt that the man's eye was severely injured, as it had to be removed at the hospital. Piet, in his evidence, said that the assault took place on the night of the 28th March; he saw no one, but he recognised the voice of the accused. This was the only evidence on which the conviction was obtained. The man had already lost his right eye through an accident, so now he was completely blind. The movements of the accused on the evening in question had been traced from seven o'clock to half-past one o'clock on the following morning.

Mr. Schreiner contended that the complainant's statement was full of inconsistencies, and totally uncorroborated. In one part of his evidence he said that he had seen the accused go to his room, and in another part he denied seeing him at all. Complainant was known to be a man of intemperate habits; it might have been that he sustained the injury to his eye in the course of some drunken brawl. It was even possible that his room-mate, Sam Christian, who had disappeared, might have been the assailant. The complainant had given different versions of how he sustained the injury. Under all the circumstances, he (Mr. Schreiner) maintained that there was no case for conviction; no jury would have convicted on such evidence.

The Chief Justice said it had been contended on behalf of the prisoner that if the case had been tried before a jury he would have been acquitted, but if a jury believed the evidence of Piet they would be bound to convict the accused, and it was apparent that the Magistrate believed complainant's evidence. Piet had lost one eye, and had been assaulted on the other, so that it was not to be wondered at that he could not distinguish the face of his assailant, but he had no doubt whatever that the voice was that of the prisoner. It was not as if it was the voice of a stranger, because Piet had been in the service of the prisoner for some months and therefore knew his voice well. Piet swore that he accused the prisoner of having assaulted him, when he simply walked away, not denying the charge. It was attempted to be proved that the prisoner could not possibly have been at the place where the assault was committed at the hour indicated, but one could quite imagine that a man suddenly roused out of his sleep might make a mistake as to the time. There did not seem to be any inconsistency in the complainant's statement. If the Magistrate believed Piet, he was not bound to believe the witnesses for the defence. The Magistrate exercised the functions of a jury; the

Court did not feel justified in reversing his decision, and the appeal must therefore be dismissed, with costs. Sam Christian had disappeared, and it had been suggested on behalf of the prisoner that he might have committed the offence. Sam Christian was the man who acted the part of the Good Samaritan, and took Piet to the hospital. There was no suggestion by the complainant at any time that Sam committed the assault.

[Appellant's Attorneys, Messrs. C. and J. Buissinne.]

REGINA V. DIRK VAN VLIET. { 1892.
15th June.

Arson—Marriage in community—Conviction—Point reserved.

A husband married in community of property cannot, in the absence of injury to the property of others, be convicted of arson, where the property burnt is property belonging to himself and his wife.

Mr. Giddy appeared for the Crown, and Mr. Sheil for the prisoner.

This was a case which came on for argument on a point reserved for the consideration of the Supreme Court, by the Judge-President of the Eastern Districts Court, at the trial of the prisoner at the Circuit Court held at Uitenhage on the 2nd March, 1892. The prisoner was indicted for the crime of arson: "In that, upon or about the 20th day of September, in the year of Our Lord 1891, and at Uitenhage aforesaid, the said Dirk van Vliet did wrongfully, unlawfully, and maliciously set fire to and set on fire the house, there situate, the property or in the lawful occupation of Lena van Vliet, whose occupation is to the prosecutor unknown, and now or lately residing at Uitenhage aforesaid, with intent to burn and destroy the same, and to injure the said Lena van Vliet in her property." The jury returned the following verdict: "Guilty of setting fire to the house with the intent charged, the property being the joint property of himself and his wife." The prisoner was sentenced to two years' imprisonment with hard labour. The learned Judge-President reserved for argument before the Supreme Court the following point: "Whether the prisoner could be convicted of arson, the property burnt being property belonging to himself and his wife."

Mr. Sheil after stating the facts said: Having regard to the effect of marriage in community by our law on the joint property of the spouses, it will not be necessary to labour the proposition that a man married in community of property may destroy that property by fire or otherwise

without exposing himself to a criminal charge, as long as he does no injury to the property of his neighbour. This doctrine if correctly stated is not peculiar to our law (Bishop's Commentaries on American Criminal Law, vol. I., section 514, and vol. II., section 12; Bell's Dictionary and Digest of the Law of Scotland, under the heading of "Fire-raising," p. 386). At English common law a man could not be convicted of arson who had burnt his own house (Holmes's Case, Cro. Car. 876, W. Jones, 851; vide Russell on Crimes, vol. II., p. 899). Coming to our own law, Carpovius (1, 38) is clear that if anyone sets fire to his own house he is responsible for the consequences of his act, and if the houses of others being contiguous are burnt he is liable. Van der Linden on the subject of arson says (Counsel read the passage—B II., cap. 4, sec. 8). So that the essence of arson is that the property of others should be injured. I submit, therefore, that where a man is indicted for burning his own house, as in the present case, the intent to injure others not identified with himself must be proved. A man is, however, responsible for the consequences of his acts, and if the property of others has been injured by his burning his own house, the law will presume malice (vide Archibald, pp. 580 and 584). In the present case there was no intention to injure the property of others; the property injured belonged to the prisoner and his wife, and in the absence of injury to the property of others the law cannot presume an intent. The prisoner's wife is too closely identified with him to justify the conviction—"Rex v. March," 1 Mood. C.O., 182. The conviction should be quashed.

Mr. Giddy, on behalf of the Crown, referred to *Matthaeus de Criminibus*, 48, 5, 6; to Carpovius, 1, 88, 2; and contended that the word *incendium* used by these writers included the present offence charged. He also referred to the case of "*Regina v. Enslin*," 2 Appeal Cases, 69, 119.

Mr. Sheil, in reply, referred to Grotius, Schorer's Notes, 96, 150 and contended that *Regina v. Enslin* had no application to the present case.

The Chief Justice, in giving judgment, said this case raised a very interesting question. At first sight it appeared to be a somewhat difficult question, but after fully considering the legal relations subsisting between the husband and wife, who were married in community of property, it was not so. By our law, in cases where persons were married in community of property, the husband had the right to dispose of the joint property as he thought fit, subject to the right of the wife to apply to the Court for an interdict in case her husband was squandering the property. Supposing in this case the prisoner had pulled the house down and not burned it, he (the Chief Justice) was quite satisfied that he could not have been charged with malicious injury

to property. Setting fire to the house might be for the purpose of destroying it, and if by doing so he did no injury to others he could not be charged with arson. Supposing a person had a tumble-down cottage at a distance from his house and wished to burn it down, he surely could not be charged with arson. A person could only be convicted of arson if in burning down his house he injured others as well as himself. In the present case the husband and wife were joint owners, being married in community of property, and the husband had the administration of the property. If he burned down the house he could not be tried for arson so long as others were not injured in their legal rights. He expressed no opinion as to the case where the husband and wife were married by ante-nuptial contract, the Court could only deal with the case actually before it. The crime the prisoner was charged with had not been committed, and an order must be given for his immediate release.

In re REGINA v. SIVUNKA. { 1892.
15th June.

Native Territories Penal Code—Act 24 of 1886, section 142—Indictment—Verdict—Culpable homicide—Point reserved.

A prisoner indicted for murder under the Native Territories Penal Code may be convicted of culpable homicide

Mr. Giddy appeared for the Crown and Mr. Moltano for the prisoner.

This case came on for argument on a point reserved at the last Circuit Court held at Umtata.

The prisoner was charged with murder in contravention of section 142, Act 24 of 1886. He was acquitted of the capital charge, but was found guilty of culpable homicide and sentenced to five years' imprisonment with hard labour.

The learned judge who presided at the trial reserved for argument before the Supreme Court the question: Whether upon an indictment charging him with murder under Act 24 of 1886, section 142, the prisoner could be convicted of culpable homicide, there being no alternative count in the indictment.

Mr. Moltano contended, firstly, that the prisoner was charged under a wrong section. He should have been charged under section 140, which constitutes the crime of murder, the only person who could contravene section 142 would be the presiding judge. The substantial point was, however, whether on an indictment of murder in contravention of section 142 a verdict of culpable homicide could be returned. The crime of murder in the Transkei is not a common law

offence: it is purely the creature of statute and as the crime of murder is constituted under section 140 and that of culpable homicide under section 135, and there is no clause of the Act empowering the returning of the lesser offence upon an indictment of the greater, the prisoner should have been charged alternatively in order to justify the verdict. ("Regina v. Schroeder"), 1 App. Cases, page 156, is not in point. Section 3, Act 88 of 1877, empowered the proclamation but made the crime of murder indictable as in the Cape Colony. The Act of 1886 had abolished the procedure. As under section 9, Act No. 3, 1861, and section 8, Act 15, 1864, power to return the lesser verdict had to be specially given by the Legislature; so here no power being given under the Penal Code the lesser verdict could not be received. Murder and culpable homicide being statutory offences, the section constituting them must be specially stated.

Mr. Giddy was not called on.

The Chief Justice, in giving judgment, said that before Act No. 24 of 1886 was passed the crimes of murder and culpable homicide were known in the Transkeian territory. The Act, therefore, created no new offences; its object was to define the offences. In his opinion, the indictment charging the prisoner with murder was sufficient, without mentioning the section under which he was tried. The only question, therefore, was, whether the charge of murder was so wide as to include that of culpable homicide; and if so, whether it was wide enough to justify the jury in bringing in a verdict of culpable homicide. In the case of "The Queen v. Andries Fischer," tried in 1878, the prisoner was convicted of assault, the indictment charging him with rape only. The conviction was held good, the ground being that the crime of rape included that of assault. The 40th section of Act No. 24 of 1886 shewed that, in the opinion of the Legislature, culpable homicide was included in murder. It was quite competent for the jury to find the prisoner guilty of culpable homicide, and therefore, in his opinion, the verdict ought to stand.

Their lordships concurred.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. { 18th June,
Justice BUCHANAN, and Mr. { 1892.
Justice UPINGTON.]

LA COMBRE V. HUTCHINS.

Lady's maid—Contract of service—Alleged breach by master—Action for damages.

Mr. Meltens appeared for the plaintiff, and Mr. Searle for the defendant.

This was an action instituted by Kate la Combre, a lady's maid, against David Ernest Hutchins, an official in the service of the Cape Government, for £50 damages alleged to be sustained by breach of contract.

The declaration alleged, *inter alia*, that in or about the month of January, 1891, and at London, one Violet Beatrice Walker (the defendant's wife) engaged the plaintiff to serve her as a lady's maid, at a salary of £25 a year, for three years, to proceed with her to the Knysna, Cape Colony.

That thereafter the defendant and the aforesaid Violet Beatrice Walker were married, and the aforesaid agreement ratified and confirmed by the defendant.

That thereafter the plaintiff, together with the defendant and his wife, proceeded to the Knysna, arriving there on or about 18th March, 1891.

That from the date of arrival at the Knysna, until on or about November 12, 1891, the defendant broke the aforesaid contract of service, compelling the plaintiff to perform the duties of a maid of-all-work, when the plaintiff left the defendant's house to seek her redress.

That the plaintiff had suffered damages by the wrongful and unlawful conduct of the defendant.

The plaintiff claimed: (a) £50 damages; (b) further relief: (c) costs of suit.

The defendant pleaded, *inter alia*, that the plaintiff had been engaged as a useful maid or servant, and that the amount of salary and period of service had been set forth in certain letters between the parties during the month of January, 1891, and that it was (at the same time, verbally) arranged that the plaintiff should be employed as a servant to make herself generally useful in the house.

He specially pleaded that after the plaintiff had been in service about two months she began to perform her work badly, and refused to obey lawful orders or to attend to her duties and thus broke her contract of service.

That thereafter of her own free will the plaintiff gave a month's notice to the defendant, and

left his service voluntarily, being paid her wages up to date of her departure, to wit, 18th November, 1891.

The defendant denied that the plaintiff had sustained damages in the sum of £50, or in any other sum, and prayed that plaintiff's claim might be dismissed with costs.

Issue was joined on these pleadings.

Kate la Combre deposed that she was a lady's maid, and had been in the service of several ladies in London in that capacity. The wages for this service ranged between £35 and £40 per annum. In January, 1891, while she was in the service of Mrs. Candy, of Beaufort Gardens, Chelsea, London, she had an interview with Miss Walker (now Mrs. Hutchins), and was engaged by her to fill the situation of lady's maid, but to do no menial work. Miss Walker told her that she was going to be married, and then proceeded to the Knysna, where her intended husband resided. The remainder of the negotiations were carried on by letter, and amongst them it was stipulated that if the plaintiff gave notice she would forfeit her passage money to England, but if she remained until the end of the contract then the defendant would pay it. She was not aware that she was coming out to the Cape as an emigrant. She arrived at the Cape with Mr. and Mrs. Hutchins in February and proceeded to the Knysna, where they put up at an hotel, but subsequently removed to a cottage which was in a bad state of repair. She objected generally to the work which she had to do, but principally to emptying the bath water, and on the 19th September she told Mrs. Hutchins that she was not strong enough to do menial work, whereupon Mrs. Hutchins told her that if she did not do the work she could go, and the defendant told her that according to the law in the Colony he could discharge her at a month's notice. As they still insisted upon her doing menial work she gave a month's notice, and demanded her passage money to England, as the defendant had broken the contract. On the 9th November the defendant paid her her wages up to date. She then left, and after putting up for a couple of days at Young's Hotel, came to Cape Town by steamer. She never disobeyed any orders which might be given to a lady's maid.

Cross-examined: She was never told by Miss Walker that if she came out to the Cape she would have to turn her hand to anything. Defendant three times threatened to throw her out of the house. She never heard before that she had a bad temper, and she never went about the house talking in a loud voice about her mistress. She told Mrs. Hutchins that she would help in the house work for three months if she was allowed a room to herself. In addition to her lady's maid work she had to carry water, and perform other

menial duties. The water cans were too heavy for her to carry. The defendant paid her in November, and on the receipt she wrote a claim for sixteen guineas for her passage home. She never told Mr. Hutchins that she would rather be a dressmaker in Cape Town than return to England.

Jane Gerber deposed that she was a cook, now in the service of Colonel Clayton. She lived with the plaintiff in the service of the defendant at the Knysna, and so far as she knew the plaintiff conducted herself well. She had to do all the work of a general servant, such as emptying the slops, carrying water, and other duties of that nature.

For the defence was called Violet Hutchins, who deposed that about the 5th January last year she had an interview with the plaintiff, and an arrangement was come to by which the latter was engaged for three years, at a salary of £26 per annum. It was understood between them that the plaintiff should be engaged as an useful maid, and not as a lady's maid, and that she would have to turn her hand to anything. She knew the plaintiff had been a lady's maid, and was somewhat surprised that she preferred a place as an useful maid; in consequence of that she gave her some days to think over the matter. The house at Knysna was a very small one, only containing four rooms. The plaintiff was very civil for about three months, and then she began to get very impertinent, answering witness back, and making herself generally disagreeable. The plaintiff took upon herself to carry the bath water; she was never ordered to do so. The water-cans were not too heavy for a woman to carry. On the 18th October the plaintiff gave a month's notice, and when she was leaving witness offered her a character, but she declined to accept it. Witness never knew a woman with such a violent temper.

Re-examined: The plaintiff brought a good character from Mrs. Candy. She did not know what induced her to leave, as she did her best to make her comfortable.

David Ernest Hutchins, the defendant, deposed that the cottage at the Knysna was a very small one. He was building a house there, but stopped operations as he was removed to Cape Town. The plaintiff was acting so violently that he was glad to pay her off, but declined to pay her passage-money home. She had cost him £88 up to the present time, and had given in return only two or three months' useful service. He found he had caught a Tartar. His wife was too good to her.

Cross-examined: He told her if she insisted upon her conduct she would have to go before the Magistrate. He did not remember, on the 19th September, ordering her to clean a grate; neither did he threaten to throw her out of the house, as he could not even lift her. His wedding was

described in the *St. James's Gazette* as a "Marriage in High Life"; his wife's brother was in the Army, and he himself was in the Civil Service of the Colony. He never told the plaintiff that she was coming out to the Cape as an emigrant; she must have known it, as she travelled in the steamer third class. He never insisted upon a dog's sleeping in the plaintiff's bedroom. Mr. Robinson, an attorney at the Knysna, informed him that the plaintiff had been to him, and he had spoken to her like a father. On the 18th October he threatened her with the law because she had failed to fill the baths.

Mr. Molteno submitted that his client had fully made out her case, a most important element being the character given by Mrs. Candy, which should speak for itself. It was now contended that the plaintiff, who had always occupied the position of a lady's maid, was engaged as a maid-of-all-work. The defendant had to admit that the carrying of the bath water was the principal cause of the dispute between the parties, the plaintiff never ceasing to protest against being employed in menial duties. It was now attempted to show that she was a most violent-tempered woman, but the evidence of Jane Gerber disproved that. He submitted that his client had fully made out her case, and was entitled to the remedy she claimed.

Without calling upon Mr. Searle, the Chief Justice said it was not quite clear from the declaration what was really the cause of action. It was alleged that the defendant had broken the contract of service by compelling the plaintiff to perform the duties of a maid-of-all-work, and that therefore she ought to recover damages. In point of fact, the plaintiff herself gave notice to leave the defendant's service, but he thought it might be taken also that if she was ordered to do work which she was not engaged to do, and that in consequence of being so ordered she gave notice, they might take it that it amounted to a dismissal. That being so, the legal question was whether, in the original contract between the parties, it was stated that the plaintiff was to come out as a lady's maid or as a general maid. On this point the Court had to depend entirely upon the evidence, the correspondence not assisting in any way, except in so far that there was nothing in the correspondence to show that the plaintiff was engaged solely as a lady's maid. The first time the words "lady's maid" were mentioned was on the 18th October last, when notice was given by the plaintiff, who stated positively that she was engaged as a lady's maid, whereas, on the contrary, Mrs. Hutchins as positively and clearly understood that she was to do the work of a general servant; and she was supported in this by her husband, who well knew the circumstances of the country, and impressed upon his intended wife the desirability of employing a person who

not only could act as lady's maid, but also carry out the duties of a general servant. When the plaintiff came out she did general as well as lady's maid's work, and it was only afterwards, when she became dissatisfied, that she refused to perform the first-named work. Under the circumstances, he was inclined to the opinion that she was to be a useful maid, and not merely a lady's maid; and if that view of the case was correct, the Court must decide that the action for damages had failed. He wished to add this remark, that until this case came into Court nothing was said about damages for unlawful dismissal; what the plaintiff asked for was her passage money back to England. Judgment must be for defendant, with costs.

[Plaintiffs' Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorneys, Van Zyl & Buismine.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] 17th June, 1892.

COLONIAL ORPHAN CHAMBER V. MERVILL.

Mr. Searle moved for an order attaching a life policy in the Mutual Society, and certain funds in the hands of Messrs. Findlay & Tait, *ad fundandam jurisdictionem*, in an action about to be instituted by the plaintiffs against the defendant for breach of trust; also for leave to sue by edict.

The Court granted the order, the citation to be returnable on the 12th July.

MARKS V. KOSKE.

Mr. Juta appeared for the plaintiff; defendant in person.

This was an action instituted by the plaintiff against the defendant to recover certain jewellery pledged by the plaintiff to the defendant for an advance of £10 17s. 6d., or £50 damages.

The defendant produced the jewellery in court, and alleged that he was willing to restore it when he had been paid his debt.

The plaintiff gave formal evidence of the pledge, and asserted that many of the articles produced were not his.

Simon Frank and Joseph Rototaki were called, but threw very little light on the matter.

For the defence was called Joseph A. Carroll, messenger of the Magistrate's Court, who deposed that he attached some property belonging to plaintiff on the 28th July last. On the 1st September

plaintiff and defendant came and released the goods. He could not swear to the watches, but some of the other articles resembled those which had been attached.

Louis Lyons deposed that the defendant showed him the jewellery on the day it was released. He recognised some of the watches, as one or two of them were formerly his property. One watch he sold to defendant, but how it got into the possession of plaintiff he could not say.

Solomon Koske deposed that the goods which he released from the custody of the messenger were the same as now produced in court.

Cross-examined: He offered to return the goods to plaintiff on receipt of his money, about a fortnight after they had been pledged. That was before the advertised sale. Plaintiff told him he could sell the goods if he liked, but he did not do so. The money was not paid, and it was never afterwards tendered. In November last he received a lawyer's letter demanding the goods, and tendering the amount for which they had been pledged. On receipt of the letter, he took the goods to the office, but not seeing the money he did not produce them.

Mr. Juta said this was a simple question of credibility. The plaintiff knew the numbers of the watches he claimed.

The Chief Justice remarked that it would be more satisfactory if he could produce the persons who sold him the watches. There was nothing whatever to support his statement.

Mr. Juta having briefly addressed the Court for the plaintiff,

The Chief Justice said in this case he was of opinion that the articles produced by defendant were the articles pledged to him by plaintiff. The latter alleged that other articles were pledged, and said that he had kept the numbers of the watches; but he did not produce the persons from whom the watches were purchased, nor did he produce Mendelsohn, from whom he alleged that he had bought some of the goods, nor did he produce any papers to show that he had paid Customs dues on the articles he said he had imported. On the other hand, the defendant was supported by the evidence of Carroll and Lyons, the former saying that though he could not swear positively to some of the articles, they were of the same class as those which had been attached by him. Under all the circumstances he (the Chief Justice) was of opinion that the evidence for the defendant should receive credence. The Court would order the articles to be handed over to the messenger of the Resident Magistrate's Court for the purpose of being sold, the sum of £9 17s. 6d. to be paid to defendant, anything realised beyond that sum to be handed over to plaintiff.

[Plaintiff's Attorneys, P. Brink.]

TADMAN V. TADMAN.

Mr. Schreiner for plaintiff; defendant in default. This was an action for restitution of conjugal rights on the ground of malicious desertion, failing which for divorce.

Mary Alice Tadman deposed that on the 31st March, 1879, she was married to Charles A. Tadman at Trinity Church, Cape Town. They never lived happily together, and in 1882 she left her husband for a short time, his sister being the cause of dissension. During the same year, at Seymour, she left him again because he ill-treated her. Since that time she had supported herself; at times she had kept a boarding-house, and had also been in service. She met Mr. Hatch subsequently, and went through the form of marriage with him, fully believing that her husband was dead. She last saw him towards the latter end of 1884, at Aliwal North. She asked him if he was going to help her, and he told her to come to him in a few days. She remained at Aliwal North for fourteen days, and then discovered that he had left the town. Since that time she had never seen her husband, nor did she hear of him until a letter was received by her, which was produced at certain previous proceedings. The child of the marriage was now at school, and she desired to have its custody. The whereabouts of her husband had since been discovered, but she had received no communication from him.

The Chief Justice said that a decree would be granted for restitution of conjugal rights, the defendant to return to or receive his wife by the 15th August next, failing which, the Court would grant a rule nisi calling upon the defendant to show cause why a decree of divorce should not be granted, and the plaintiff to have the custody of the child of the marriage. Personal service to be made if possible, failing which, one insertion in the *Daily Telegraph*, London.

COLONIAL GOVERNMENT V. BRITISH SOUTH AFRICA COMPANY, LIMITED.

Licence—Act 3 1864, Tariff 17 (a) (b)—Act 20 of 1884—Joint Stock Company carrying on business in the Colony—Royal Charter—Deed of settlement.

Mr. Searle and Mr. Jones appeared for the Government, and Mr. Schreiner, Q.C., and Mr. Watermeyer for the defendant company.

This was an action instituted by the Assistant Treasurer of the Colony against the British South Africa Company (Limited), to recover the sum of £500, licence duty alleged to be due for the year 1891, under Act 3 of 1864, tariff 17, as amended by Act 20 of 1884.

The plaintiff in his declaration, after referring to the objects for which the company had been formed as defined by the Royal Charter, to which he craved leave to refer, and alleging that the managing director and principal representative of the company, the Hon. Cecil John Rhodes, resided in Cape Town, and that the company had an office there, at which a staff of clerks was employed for the purpose of carrying on the company's business, and that at the said office business relating to the company's affairs was transacted, and that the secretary of the company resided in Cape Town and transacted business on behalf of the company at the said office, contended that under tariff 17 of Act 3 of 1864, the defendant company was liable to take out the licence therein referred to, and to pay for the same at a rate of 1s. for every £100 of subscribed capital, as being a joint-stock company, carrying on business within this colony within the meaning of the said tariff 17, section 1, sub-sections (a) and (b). The plaintiff claimed:

(a) An order declaring that the defendant company was bound to take out the said licence and to pay the sum of £500, the amount due according to the said tariff with interest *a tempore morae*.

(b) Alternative relief.

(c) Costs of suit.

The defendant company in their plea said, *inter alia*, that their office in Cape Town was not the head office of the company, which they alleged was in London, and that the secretary of the company in connection with its head office resided, not in the Colony but in London. The defendant company denied the contention of plaintiff with regard to alleged liability, and craved leave to refer to the terms of tariff 17 of Act 3 of 1864, as amended by Act 20 of 1884. The defendant company specially pleaded that the chief seat or principal place where the business of the company was managed was in London and not within the Colony, that none of the dealings of the company were, either by the Royal Charter or their deed of settlement, described as to be carried on in this colony, and that the company was not a joint-stock company carrying on business within this colony within the meaning of the said tariff so amended. Wherefore the company prayed that the plaintiff's claim might be dismissed with costs. The replication was general, and issue was joined on these pleadings.

Mr. Searle having opened the case and put in a copy of the company's charter, deed of settlement, copies of correspondence, power of attorney in favour of Mr. Rhodes, and certain share certificates, intimated that he had no oral evidence to lead.

Mr. Schreiner called Dr. F. B. Harris, who deposed that he was secretary in South Africa of the defendant company, which had its head office at No. 19, St. Swinfin's lane, London. There was

ne local board of directors, Mr. Rhodes was the managing director. The other secretary resided in London. There was no local seal for the Colony. All transactions were referred to the head office. In contesting this case the company was acting upon legal advice. The company was advised that there was no licence which they could pay.

Cross-examined: There was a considerable staff of clerks in the office. Almost all the arrangements in connection with the company's business, wherever transacted, must pass through the office here. Very great latitude was given by the Board of Directors to Mr. Rhodes, but everything should be approved of in London. Contracts were entered into here for the benefit of the company, and purchases were made from time to time in order to supply the staff of the company. A sale had been held at Kimberley of some spare equipment, but the company sold no produce, or anything of that kind. The Countess of Carnarvon had been purchased at Port Elizabeth for the purposes of the company.

By the Court: The company carried on no banking business in the Colony. The business of the office was almost entirely clerical. The company occasionally forwarded supplies over the Colonial railway lines to the North. The railway alluded to was completed in June, 1890, and had entirely passed out of the hands of the company.

Mr. Searle contended that the company was liable to pay duty under tariff 17, section 1A, of the Act. For all practical purposes the principal business of the company was done in Cape Town. The widest powers were conferred upon the managing director, Mr. Rhodes, and where he lived was the principal business-place of the company. That being the case, it seemed to him to be quite clear that the company was liable. Although the annual meeting was held in London and the shares issued there, all the practical work was done here. Even if the Court was against him on that point, under sub-section B the company was clearly liable. He referred to the cases of "Queen v. Pistorius," 5 Juts, p. 106; "Smith v. Anderson," 15, Law Reports, Chancery Division, 245, as to the meaning of the term business, and to "Erickson v. Last," 8 Q.B.D., 414.

Mr. Schreiner: The question the Court has to determine is whether the defendant company is a joint-stock company carrying on business within this colony within the meaning of the tariff. Before 1887 the company would have to have taken out a licence under section 5 of the old Act. That section is, however, repealed by Act 88 of 1887. The business of the company in the Colony is merely that of agency. He referred to Maxwell on Statutes, 259, and to "Sulley v. The Attorney-

General," 5 H. and N., 711. The case of Pistorius is distinguishable from the present.

Mr. Searle, in reply, referred to "Stroud's Dictionary," 24, 25, 26, and contended that the repealed section 5 referred to the agent of a foreign firm.

Cur ad vult.

Postea (June 29th).

The Court delivered judgment.

The Chief Justice said the question to be determined in this case is whether the defendant company is liable for stamp duty in terms of the 17th Schedule to Act 8 of 1864. The schedule in question provides that: Every joint-stock company carrying on business in this colony shall annually take out a licence, for which there shall be payable for every £100 of the subscribed capital of such company 1s.

1. The term joint-stock company shall, for the purposes of the above licence, embrace:

(a) Every company having a capital stock divided into shares, of which company the chief seat or principal place where its business is managed shall be within this colony.

(b) Every such company of which the chief seat or principal place where its business is managed shall not be within this colony, but of which any of the dealings shall, by the deed or other instrument regulating such company, be described as to be carried on in this colony.

As to sub-section (a) there is no doubt that the chief seat or principal place of business of the Chartered Company is in London, and not in Cape Town. Therefore it is clear that sub-section (a) does not apply.

As to sub-section (b) I have looked carefully through the charter and deed of settlement, and can find nothing therein which describes this colony as the place in which the business of the company is to be carried on.

There can be no doubt but that the company is allowed by its charter to establish an agency in this colony. According to section 24 (XIII.) of the charter the company is, *inter alia*, specially authorised and empowered "To establish and maintain agencies in far colonies and possessions, and elsewhere." In point of fact an agency has been established in this colony under the direction of Mr. Rhodes, the local director of the Chartered Company. If the 17th Schedule had stopped with the first section, there would have been considerable doubt with regard to a case like the present. The 5th section seems to me, however, to remove any doubt on that point. The 9th section shows that a company, although it has a local director in the Colony, may still be deemed, under the schedule, to carry on business through

the instrumentality of an agent. If the 5th section had not been repealed there can be no doubt whatever that the Court would have held that the Chartered Company was bound to take out a £50 licence. In point of fact that section has been repealed, and no provision has been substituted for it to meet a case like the present. The result is that in my opinion the Chartered Company is under no liability to take out a licence. Regarding this particular company I do not know that any wrong has been done to anyone, because it has not come into competition with traders in this colony. With regard to this company, we are probably only carrying out the real intention of the Legislature, although obscurely expressed, but it may well be that the effect of our decision will be to relieve other companies who in fairness ought to take out licences. It is well, therefore, that it should be known that as the law stands a company whose trust deed does not state that its business is to be carried on in this colony, and which in fact carries on a business here through the instrumentality of an agent, is relieved from duty. If any hardship is thus done to traders in the Colony, the Legislature which is now sitting will no doubt remove the hardship. Upon the question whether the defendant company does in fact carry on business in this colony, the evidence is very meagre. But for the admission paper, which states that the company carries on business in its Cape Town premises, the evidence would have been all the other way. The admission probably meant no more than that the company does its clerical work in the premises, but the language used is somewhat unfortunate. In the view, however, which we take of the case this point is of little importance. Inasmuch as the company has not its head office in the Colony, and neither its charter nor its deed of settlement describes this colony as a place in which its business is to be carried on, and inasmuch as the business (if any) which it carries on is done through the instrumentality of an agent, it does not fall within the provisions of the 17th schedule. Judgment must therefore be given for the defendant company with costs.

Mr. Justice Buchanan: The Chief Justice has expressed the unanimous judgment of the Court.

[Attorneys for the Government, Messrs. Reid & Nephew; Attorneys for the Company, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON.] 20th June, 1892.

CORBRIDGE V. WELCH.

Mr. Schreiner, Q.C., and Mr. Graham appeared for the appellant, and Mr. Searle for the respondent.

This was an appeal from that part of the judgment of the Judge-President of the High Court which gave absolution from the instance as against the defendants Corbridge, Eland, and Seavill in an action instituted against them and one Ward by the present respondent, plaintiff in the Court below.

The plaintiff claimed, *inter alia*:

1. A declaration that he was entitled, under certain agreements, to receive from the defendants a commission of 10 per cent. upon the net profits received, or to be received, by them arising from the sale or disposal of any mining and prospecting rights or concessions held by them in or over the farm Speculatie, on which was discovered the Wesselton Mine.

2. A declaration that he was entitled to select and choose ten claims within the main reef of the said Wesselton Mine, or that he was entitled to a share equal to ten claims in the net profits derived or to be derived from the sale of the said rights by defendants.

The Court, without calling upon counsel for the defendants, gave judgment in favour of the defendant Ward, and as to the other defendants, the judgment was one of absolution from the instance. From the latter part of this judgment the defendant Corbridge now appealed on the grounds that the judgment should have been a final one.

Mr. Schreiner gave a *resumé* of the evidence and the proceedings generally in the High Court, and argued at length that Welch had no right of action, and that the only object the appellant sought to attain was to have judgment in his favour, so as to definitely close mere vexatious proceedings. He did not press for costs.

Mr. Searle followed on behalf of the respondent, contending that Welch was clearly entitled to some benefits from the concessions granted. It was clear from the evidence of a large number of witnesses that Corbridge was interested with Ward. There were many reasons why the case should not be foreclosed.

Mr. Schreiner having replied, the Court reserved judgment, and on the following day (June 21st) dismissed the appeal with costs.

[Appellant's Attorneys, Messrs. Tredgold, McIntyre and Bisset.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, {
K.C.M.G. (Chief Justice), Mr. 21st June,
Justice BUCHANAN, and Mr. 1892.
Justice UPINGTON, K.C.M.G.}]

IN RE CAPE OF GOOD HOPE BANK, IN LIQUIDATION.

Mr. Schreiner moved for the sanction of the Court to certain compromises proposed to be effected by the official liquidators with debtors of the bank.

The Court granted the required sanction.

The following is the list of compromises:

Christian, Basil Evan, Melbourne, Australia, £360; offers cash £50, paid, further £50 held in trust payable against release.

Danckwerts, Ernst Heinrich, Klerkedorp, £181; offers cash £20, paid, and all securities in the bank's possession.

Green, Frank Jordan Home, Johannesburg, £3,746; offers cash £230, already paid.

Findlay, Robert Morton, Johannesburg, £3,756; offers £1,250 in twenty promissory notes of £62 10s. each payable 7th of each month on security of W. G. Cunliffe, release to be granted conditionally on due payment of said promissory notes.

Howard, John Edward Percy, Johannesburg, £4,000; offers cash £50, paid, and twelve promissory notes of £37 10s. each, payable 1st of every month, release conditional on due payment of said promissory notes. In event of failure to meet any of the notes the whole debt to revive and all sums paid to that date to be retained in reduction of the debt.

Jecks & Co., William R., Port Elizabeth, £2,087; offers cash £150, paid, and all securities in the bank's possession.

Koenigsberg, B., Johannesburg, £4,287; offers cash £190, paid, and all securities in the bank's possession.

McLea & Rush, Johannesburg, £4,507; offers cash £300, paid, and all securities in bank's possession.

Malan, David Johannes, Wellington, £2,075; offers cash £100, paid, all securities in the bank's possession, and promissory note for £575 on guarantee A. J. Malan, release to be

granted subject to the payment of said promissory note.

Retief, Gideon Michel Johannes, Wellington, £2,075; offers cash £675, paid, and all securities in bank's possession.

South African Turf Club, Cape Town, £320; cash £100, paid.

Smith, Henry William, Johannesburg, £1,445; cash £50, paid, all securities in bank's possession, and promissory note for £50, release to be conditional on due payment of such promissory note, which is due 6th December, 1892.

Whitehead, H. M. (with five others), London, £11,268; offer, which is made by Mr. Percy Whitehead, of £300 for Mr. H. M. Whitehead's release, who is an inmate of a London hospital, and from whom it is not possible to obtain a sworn statement of assets and liabilities.

Knobel, John Balthazar, Pretoria, £500; offers cash £100, paid, securities in bank's possession, and dividends from two bills for £618 9s. 6d. and £50, proved in insolvent estate of J. J. van Reenen.

MYBURGH AND OTHERS V. TOWN COUNCIL OF CAPE TOWN.

Mr. Juts, on behalf of H. H. Myburgh, Ryk A. M. Myburgh, and the estate of Van Oudtshoorn, moved to have the award of the arbitrators made rule of Court. A consent paper had been filed.

The order was granted.

RE THE MINORS PETERSON.

Mr. Watermeyer applied for an order giving leave to the guardian of the said minors to join in passing a mortgage bond of £450 on security of the landed property in the estate of the late Simon Peterson, the said property being about to be transferred to the heirs.

The order was granted.

PETITION OF ABIE PIETERSEN.

Mr. Molteno applied for an order authorising the Registrar of Deeds to amend certain deed of transfer, dated the 16th November, 1892, and all subsequent deeds, transferring certain lot of ground, marked No. 4, Mechanics' Retreat, Graham's Town, by causing the extent thereof to be described as sixty square rods, instead of sixteen, erroneously inserted.

The order was granted.

RE ABRAHAM D. COHEN.

Mr. Searle applied for an order authorising the Registrar of Deeds to accept as valid and effectual a power of attorney executed by the said Cohen in

the presence of a notary public at Birmingham, but not otherwise authenticated, in terms of section 49 of the Deeds Office Regulations.*

The Court granted the order under the special circumstances set forth, but intimated that the order should not be taken as a precedent.

IN RE UNION BANK, IN LIQUIDATION.

Mr. Schreiner applied for an order in terms of the second report of the official liquidators, making absolute the rule nisi for a further call of £85 per share, with interest.

The Chief Justice observed that the Court had considered the report of the liquidators, but there were some matters upon which fuller information was desired. The Chief Justice read the subjects upon which the Court required further information. They were as follows: "(1) Whether the liquidators had been appointed trustees of the insolvent estates of any persons who had become insolvent owing to the failure of the Union Bank, and if so, what estates. (2) Whether in advising calls of £150 instead of £185 in the first instance, the liquidators bore in mind the probable competition of call by other banks upon the contributories, and whether any sum which might otherwise have been recovered would be lost to the bank in consequence of the original call having been insufficient. (3) The names of contributories who had not paid their calls in full (except those with whom compromises had been made and sanctioned), and the reason, in regard to each, why the money had not been recovered. (4) Similar information regarding debtors to the bank of over £100. (5) Why all the securities held by the bank had not been realised, and at what date the liquidators could undertake to finally liquidate. (6) Whether the liquidators had entered into any negotiations with creditors of the bank for a reduction of the rate of interest payable on the balance of debts owing." The Chief Justice further observed that he would have preferred some information regarding the conduct of the directors of the bank. If the liquidators were not to investigate their conduct, he did not know who would. In the previous report, there was some meagre information, but in

* Section 49 of the Deeds Office Regulations is as follows:

Powers executed elsewhere within Her Majesty's dominions must be authenticated by the signature and seal of office of a mayor or of a notary public: provided that in the latter case the appointment of such notary public must be certified under the hand and seal of a mayor or proper Government officer.

Powers executed in the United Kingdom will also be accepted if authenticated by the Agent-General for the Cape Colony.—Ed.

the second report there was no information at all with regard to the conduct of the directors in their transaction of the business of the bank. As to the present call of £85, it would for many reasons have been better if this could have stood over, but on the other hand, if there was to be any competition with other creditors in insolvent estates, the sooner the call was made the better. The last point on which information was asked, was the payment of interest to creditors. Five per cent. seemed pretty high, the more so as there was no inducement to creditors to urge on the immediate liquidation as they got their 5 per cent., whereas they could only get 8½ per cent. from Government stock.

Mr. Justice Buchanan said that with reference to the remarks of the Chief Justice as to the conduct of the directors, it seemed to him that the investigation of the directors' conduct was a matter open to discussion, but the liquidators ought to be able to say whether they could trace any pecuniary liability to the directors, and whether any money might be recovered from them which could go towards the liquidation.

Mr. Schreiner said he was sure the liquidators would take notice of the remarks of their lordships.

The Chief Justice observed that his attention had been called by his brother Upington to the 49th section of the Winding-up Act of 1868, a section which he was afraid was too much lost sight of. It provided that "where any order is made for winding up a company under this Act, if it appear in the course of such winding up that any past or present director, manager, officer, or member of such company has been guilty of any offence in relation to the company, for which he is criminally responsible, the Court may, on the application of any person interested in such winding up, or of its own motion, direct the official liquidator to institute and conduct a prosecution or prosecutions for such offence and may order the costs and expenses to be paid out of the assets of the company." His lordship asked how the Court was to give such direction unless information were obtained from somebody; and if the liquidators gave the Court no information, who was to give it?

Mr. Schreiner remarked that that difficulty had been felt in all liquidations, no one appeared willing to undertake the inquiry.

The Court made absolute the rule nisi as to the further call of £85.

IN THE ESTATE OF SAMUEL LAZARUS.

On the motion of Mr. Maekew, authority was given to the Registrar of Deeds to amend a deed of transfer made in favour of the said Lazarus

on the 26th March, 1886, conveying to him two lots of ground at Zonnabloom, by substituting Block T for Block X, erroneously inserted.

SUPREME COURT

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 29th June,
Justice BUCHANAN, and Mr. 1892.
Justice UPINGTON, K.C.M.G.]

IN RE REINERS VON LAER AND CO. V. FEHR.

With regard to this case the Chief Justice said: In view of the Court having ascertained, since the making of the order of the 12th April, 1892, that the respondent's application for the registration of his trade mark had specified the representation of the "Sun" as a distinctive feature of his label, argument is desired upon the questions: (a) Whether the use of the words "Original Sunbrand" on the applicant's subsequent trade mark does not create such a resemblance to the respondent's mark as to be calculated to deceive; and therefore (b) whether the order of the 12th April, directing the Registrar of Deeds to register the applicant's trade mark, should not be revoked. Notice of this to be given to the attorneys for the applicants and respondent respectively.

ABARDER V. NOWROSJIE AND ANOTHER.

Mr. Juta appeared for the applicant, and Mr. Graham for the respondents and their agent, Mr W. B. Shaw.

Mr. Juta moved for an order to make absolute the rule nisi restraining the respondents from paying over to Seid Mahomet Rashee the amount of a judgment obtained by him in the Court of the Resident Magistrate of Cape Town, and for an order requiring the same to be paid to the Sheriff in satisfaction of applicant's judgment against the said Rashee. It appeared from the petition upon which the rule nisi was granted that the petitioner (present applicant) was summoned by one Seid Mahomet Rashee for the payment of £100; that on the 18th May last the case was heard in the Supreme Court and judgment given for the defendant with costs. That on the 3rd June petitioner issued a writ, to which a return of *nulla bona* was made. That the said Rashee had obtained a judgment in the Resident Magistrate's Court, Cape Town, against one Nowrosjie for payment of £52, payable in monthly instalments of £2 per month, and a judgment against one Gabibodeen Abarder for £24 11s. 6d. Peti-

tioner prayed for an order restraining the above-mentioned Nowrosjie and G. Abarder from paying over to the said Rashee, or his agents or attorneys, the said monthly instalments, and also for an order that the said Nowrosjie and G. Abarder should pay to such persons as the Court should direct the said monthly instalments until the costs of the judgment in petitioner's favour should be fully paid off. On this petition a rule nisi operating as an interdict was granted.

Applicant now moved that the rule should be made absolute. It appeared from Mr. Shaw's affidavit, and from a letter written by him to the applicant's attorney, that the debt due by Nowrosjie to Rashee was settled on 5th February last by an agreement entered into under which Nowrosjie was to pay Rashee £26 on the 4th April, 1892, and the balance on the 6th June—that the £26 had been paid, and with reference to the balance, a further sum had been paid to Rashee before he left Cape Town, and that two promissory notes were passed by Nowrosjie on the 16th May last, the one due on the 7th June, and the other on the 7th July—and that both these notes had been endorsed over by Rashee to Shaw on May 16, for payment of costs, and in terms of a cessation of this debt, and also of G. Abarder's debt on the 16th April. Further, that Mr. Shaw had indorsed over the notes in question to the attorney for the plaintiff in the cases of Rashee v. Abarder and Rashee v. Leibbrandt as security for disbursements. That of the judgment for £24 11s. 6d. above referred to, £9 11s. 6d. was due to Mr. Shaw as taxed costs, the balance being the amount owed by Rashee. After argument,

The Court discharged the rule as regards the first respondent, and made the rule absolute in respect of the sum of £9 11s. 6d.; the respondent Shaw to pay the costs.

PAARL BANK, IN LIQUIDATION V. LE ROUX'S EXECUTORS.

Mr. Schreiner, Q.C., appeared for the bank liquidators, and Mr. Juta for the respondents.

This was an application to make absolute the rule nisi restraining the payment to the heirs of certain sums of money held by the Paarl Trust Company, and for application of the same in reduction of the amount due by the said estate in respect of the calls on fifteen shares in the Paarl Bank. It appeared from the petition of the liquidators that at the time the list of contributories to the bank was framed the estate of the late Jacobus Johannes le Roux (a holder of fifteen shares in the bank) had been liquidated, except two sums amounting to £269 18s. 6d. and £700, which had been placed on fixed deposit in the Paarl Trust Company by the executors, the

first amount being the maternal inheritance of Miss A. E. S. le Roux, and the second her *fidei-commissary* inheritance in terms of her father's will. The administering executor of the estate of the late J. J. le Roux, in his affidavit, denied that the sum of £969 18s. 6d., above referred to, had been placed as a fixed deposit with the Paarl Trust Company for account of the estate of the late J. J. le Roux, but alleged, *inter alia*, that the said sum was placed on fixed deposit for account of the *fidei-commissary* inheritance of Miss A. E. S. le Roux; that the interest on this amount had always been received and used for the sole benefit of Miss Le Roux, and that she was wholly dependent upon the same. Further, that after the death of J. J. le Roux the executors duly framed a liquidation and distribution account, which account was lodged with the Master, and in which account the maternal inheritance of £269 18s. 6d. and the legacy of £700 appeared, and that the estate had been finally liquidated for a space of over nine years.

Counsel having been heard, the Court made

absolute the rule nisi on condition that £100 was paid to Miss Le Roux. The costs to come out of the fund.

RE MRS. HOPLEY'S TRUSTEE

Mr. Schreiner, Q.C., applied for an order relieving Adrian van der Byl of the trusteeship established under the ante-nuptial contract executed by Anna C. van der Byl and William M. Hopley.

The Court granted the application.

IN RE ESTATE OF LATE JOHAN PETRUS
FREDRIK DIFFENTHAL.

Mr. Juta applied for an order authorising the Registrar of Deeds and the Master of the Supreme Court to amend certain two deeds of transfer and letters of administration respectively, in which the said Diffenthal was erroneously named.

The application was granted.



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"CAPE TIMES" LAW REPORTS.

A RECORD

OF

EVERY MATTER DISPOSED OF IN THE SUPREME COURT,
DURING THE QUARTER ENDING 30TH SEPTEMBER, 1892.

EDITED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE
SUPREME COURT.

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<i>Where it is clearly proved that the parent of a child under fifteen had sent such child to buy liquor from a licensed person and that the child bought the liquor for its parent.</i>	
<i>Held, that such licensed person cannot be</i>	

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		<i>A transferee with such notice has no</i>	

"CAPE TIMES" LAW REPORTS.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] 5th July, 1892.

IN RE SMITH'S INSOLVENT ESTATE.

Stamp—Act 3 of 1864, Sections 12 and 18—Insolvency—Proof—Unstamped deed of partnership—Opposition by Treasury to confirmation of liquidation account until a fine had been imposed—No order made by Court.

The Master moved for confirmation of the liquidation account in the insolvent estate of W. S. Smith.

Mr. Giddy appeared for the Treasury, and asked that a fine should be imposed in respect of a certain document upon which a proof of debt was founded.

The facts are briefly these: Mr. W. S. Smith's estate was sequestrated as insolvent. At a meeting of creditors held before the Resident Magistrate of Bedford, one Hansen tendered a proof of debt in Smith's private estate, founded on a certain written agreement. The Resident Magistrate admitted the claim, and Hansen was awarded £9 odd in the distribution. When the accounts came before the Master in the ordinary course, it was discovered that the document upon which Hansen had proved was virtually a deed of partnership between himself and the insolvent, and had not been stamped.

Mr. Giddy contended that the Resident Magistrate erred in admitting the document, which was a deed of partnership, without having imposed a fine, in accordance with Act 3 of 1864, section 12, for non-compliance with the Stamp Act, and asked that the Court should now fix the fine, before confirming the liquidation account. He referred to the case of "The Colonial Government v. Dreyer." (6 Juta, 252.)

Mr. Attorney Tredgold asked permission to be heard on behalf of Hansen, who was insolvent, and

unable to instruct counsel. Mr. Tredgold was allowed to offer an explanation as to Hansen's position, but on his proceeding to argue the case he was stopped.

Mr. Schreiner, Q.C., as *amicus curiae*, directed the attention of the Court to the case of "Ross v. Parkyns," 20 L.R. Eq., 881.

The Court confirmed the account without entering into the legal question as to whether the document in question was a deed of partnership or not.

The Chief Justice remarked that for the small amount involved it was not worth while disturbing the insolvency proceedings, the more so as the document had been all along considered as not being a deed of partnership. The Government was, however, justified in bringing the matter to the attention of the Court, and if a large amount had been involved it would have been their duty to have had all the parties before the Court. The amount of Hansen's claim would be handed to his trustee.

RUMI V. RUMI.

Mr. Juta moved for a commission to take the evidence of plaintiff's witnesses, who are employed on board the steamer Mexican, in the suit instituted by plaintiff against his wife for divorce. The necessary witnesses, the steward and stewardess of the Mexican, will leave Cape Town on August 8, and the case is set down for the 18th August. The defendant is in Southampton.

The Court made the order and appointed Mr. Oastens commissioner.

THERON V. MARAIS.

Mr. Schreiner moved to make absolute the rule nisi restraining the respondent from trespassing upon applicant's defined portion of the farm Lapfontein, and watering his stock at the spring thereon, pending an action to be instituted for a declaration of rights and for damages.

The Court made the rule absolute.

IN RE PETITION OF ERNST DE MARILLAC.
Mandamus—Warrant—Perjury.

The Court refused to grant a mandamus to compel a magistrate to issue a warrant for the extradition of a person alleged by the applicant to have committed perjury in insolvent proceedings sixteen years before the date of the application.

Mr. De Marillac applied in person for a mandamus requiring the Resident Magistrate of Cape Town to issue a warrant of arrest against Edward Amandus Lippert, charged by petitioner with the crime of perjury, in respect of the sequestration of petitioner's estate as insolvent. Applicant said he was prepared to prove by witnesses and documentary evidence every allegation made in his affidavit.

The Chief Justice asked how long ago the alleged perjury took place.

Applicant: In March, 1876.

The Chief Justice: That is sixteen years ago.

Applicant said he would explain the delay and the facts of the case, and he was sure no doubt would exist that a foul crime had been committed. Applicant then stated that in order to effect the sequestration of his estate in March, 1876, Lippert committed the perjury complained of, he having made a statement to the effect that he (applicant) had sold the whole of his stock and business for £16,000 to one Meyer, in order to defraud his creditors. After a long statement, in the course of which applicant stated that eight years ago he had applied to the Magistrate at Port Elizabeth to commit Lippert,

The Chief Justice said they had heard enough of the case.

The Chief Justice, in giving judgment, said this was an application for a mandamus requiring the Magistrate of Cape Town to issue a warrant of arrest against a person charged by the petitioner with the crime of perjury, and this perjury was alleged to have been committed sixteen years ago. If all crimes the most difficult to prove was that of perjury, and it was almost impossible to obtain a verdict of guilty even if the proceedings were taken immediately afterwards. If it would have been difficult then it would be almost utterly impossible now that sixteen years had passed. A magistrate had been applied to to issue a warrant of arrest, and he (the Chief Justice) would not say there were not cases in which a mandamus such as that asked for would be granted, but it would require a very much stronger case than had been presented in the present. It was still competent for petitioner to bring a civil action, and if there had been a malicious sequestration of the applicant's estate he had his remedy in the Civil Court. The application would be refused,

Mr. Justice Buchanan, in agreeing that the application should be refused, observed that he was familiar with the facts stated in applicant's affidavit and sympathised with him. But the applicant had made a similar charge at Port Elizabeth eight years ago, and the Magistrate then refused to take any action in the matter, and it would require a much stronger case than that presented to induce the Court to grant the mandamus now asked for.

Mr. Justice Upington agreed that the application should be refused, and thought it would be well if applicant abandoned his case. He had an opportunity to clear his character in a Civil Court.

GREEN V. ORSMOND, IN RE INSOLVENT ESTATE
OF BENJAMIN VICKERS, JUN.

Insolvency—Ordinance 6 of 1843, Sections 38—41.

At a second meeting of creditors O., representing a majority in value but not in number over £30, proposed himself as trustee.

L. was proposed by an attorney representing a majority in number.

O. was declared duly elected by the Resident Magistrate.

The Court held that there had been no election but appointed O. provisional trustee with power to administer the estate.

Mr. Juta appeared for the applicant, and Mr. Schreiner, Q.C., for the respondent.

Mr. Juta moved for an order declaring that at the second meeting of creditors in the said estate, held before the Resident Magistrate of Barkly East, no trustee was in accordance with the requirements of the Insolvent Ordinance elected, or otherwise for an order setting aside the election alleged to have been arrived at, on the ground that the trustee so elected had an interest opposed to the general interest of the other creditors.

It appeared from the minutes of the proceedings at the second meeting of creditors that applicant proved, through her attorney, a claim amounting to £200 16s. 6d., and that the respondent, on behalf of Benjamin Vickers, sen., father of the insolvent, proved claims amounting to £280 6s. 6d., and other claims, each under £30, on behalf of other creditors. Mr. A. R. Ormond, as representing B. Vickers, sen., proposed himself as sole trustee, and Mr. Attorney E. V. Cottrell proposed, on behalf of applicant, Mr. William Moray Lindrum, and objected to Mr. Ormond's appointment as trustee on the grounds, as alleged, that he was opposed to the general interests of creditors, inasmuch as he was a clerk in the em-

ployment of Messrs. Sauer & Orsmond, who were acting in matters concerning the estate as attorneys for B. Vickers, jun., and also for his father, B. Vickers, sen., one of the principal creditors in the estate, and whose claim was alleged to be a doubtful one; and further, that the said firm of Sauer & Orsmond had been employed by the applicant to recover her claim against the insolvent, with the exception of the promissory note for £3 5s., prior to the insolvency, and prior to the employment of that firm for the purpose of obtaining the sequestration of the estate. Finally, that the said Sauer & Orsmond made the application for sequestration on behalf of the insolvent, and in terms of section 41 of the Insolvent Ordinance, the said A. R. Orsmond was interested on behalf of the insolvent and on behalf of the creditor, B. Vickers, sen., in opposition to the general interests of the creditors of the estate. The Resident Magistrate declared Mr. A. R. Orsmond duly elected trustee.

Mr. Juta contended that under the Ordinance no election had taken place, and that the only question the Court had to determine was who was a fit and proper person to be appointed provisional trustee.

Mr. Schreiner, Q.C.: The question for the determination of the Court is had, Mr. Orsmond been duly elected trustee. He had a majority both in number and value of the creditors who proved claims. As to three of these their claims were under £30, but section 38 of the Ordinance cannot be held to apply to the voting for a trustee. If the claim of each creditor was under £30 who could vote? At the election all creditors may vote, and if there is a majority in value and in number the fact that there are some or all creditors under £30 should not defeat the election. He cited "Archer's Case," Buch., 1868, p. 106. Respondent has no interest adverse to the general body of creditors within section 41. The respondent was not aware of applicant's intended proceeding. He acted in the ordinary course on Vickers's instructions in drawing up his schedules. The claim of Vickers, sen., is a *bona-fide* one.

The Chief Justice, in giving judgment, said the applicant must succeed because there was not the necessary majority in number and value, and therefore there was no election. The only course open was for the Court to appoint a provisional trustee, and as Mr. Orsmond had the votes of the majority in value, and practically also in number, the Court must follow the wishes of the creditors, and appoint Mr. Orsmond provisional trustee, with power to administer the estate. Costs of both parties to come out of the estate.

IN RE ANDREW B. SPOLANDER'S PETITION.

Mr. Castens moved, on behalf of applicant, for

leave to sue in *forma pauperis* in an action against his wife for restitution of conjugal rights.

The matter was referred to counsel for his certificate.

IN RE UNION BANK, IN LIQUIDATION.

Mr. Schreiner, Q.C., moved for an order in terms of the second report of the liquidators, and also presented the special report asked for by the Court on the 21st June.

The Chief Justice: We have read the report, and it appears the liquidators are anxious that some portion of it should not be published.

Mr. Schreiner: There are two annexes—C and D.

The Chief Justice: Then ought not the report to be seen by the contributories?

Mr. Schreiner replied in the affirmative, and said there was no objection to a private sight of the report, but publication would damage the people concerned, as well as the interests of the bank.

The Chief Justice thought that no public interest would be served by publication of the report, which was a confidential one to a certain extent, and would serve no useful purpose by being placed before the public at large. It must, however, be understood that the contributories would have access to the report.

Mr. Schreiner replied that they certainly would. The orders asked for in the second report included a further call of £35, and the liquidators asked for authority to fix a date after which claims and notes should be barred. There were £702 in floating deposits not proved, and £992 of notes.

The Chief Justice said the call would be confirmed, and the limit date for proving claims would be August 31. All books and papers over eight years old would also be destroyed, as requested in the report.

Mr. Schreiner said the next point was the remuneration of liquidators. He had been asked to suggest that there should be remuneration for the twenty-one months ending April 30 last, to which date these accounts were brought down. About £340,000 in cash had passed through the hands of the two liquidators so far, and the liquidation was by far and away the largest that had been undertaken for some years. There were also very intricate matters to deal with, such as the Beit case, and the liquidation of the Standard Bank's account alone had resulted in a saving to the liquidation of £2,300. Then the liquidation had been exceptionally inexpensive. The total amount expended by the liquidators for the twenty-one months was £2,391, and recently only one clerk had been employed; in fact, it would appear to have been a model liquidation.

The salaries at the stoppage of the bank were £1,850; on the 80th April they were £490; and now they were only £180.

The Chief Justice asked what amount had been distributed.

Mr. Schreiner stated that £640,000 had passed through the hands of the liquidators; and the dividends paid were £455,000; altogether a total of £690,000 had been dealt with.

The Chief Justice said that in granting remuneration the Court would prefer dealing with a period of two years, which would be up to the 1st of August, so as to make it an annual payment. What would Mr. Schreiner, as counsel, not as a liquidator, suggest?

Mr. Schreiner thought that £2,500 each would be fair remuneration.

The Chief Justice remarked that they had considered the matter; and had come to the conclusion to give payments on the basis of two years—£3,000 for the first year and £2,000 for the second, which was certainly not too much, but a very moderate remuneration for the services rendered. This was by no means excessive, as the liquidators had had very onerous duties to perform, and very great responsibilities on their shoulders.

With regard to the claim against A. Fischer, the Chief Justice remarked that there was evidently a misconception as to the decision of the Court in the case against Fischer.

The Court did not hold that Fischer had escaped all liability. What they did hold was that he could not be made a contributory.

Mr. Schreiner observed that that and any other similar matter would receive the attention of the liquidators.

Mr. Justice Upington: I should not like to have to deal with another Beit case.

Mr. Justice Buchanan: I think the liquidators have supplied very satisfactory information in this confidential report.

An order was then accordingly made in terms of the second report.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.O.M.G. (Chief Justice), Mr. { July 12th,
Justice BUCHANAN, and Mr. { 1892.
Justice UPINGTON, K.O.M.G.]

REGINA V. RUSSOUW.

Mr. Justice Buchanan mentioned this case, which had come before him as judge of the week on review from the Resident Magistrate of Namaqualand. The accused was charged with contravening

section 6 of Act 18 of 1870, in that he wrongfully and unlawfully carried on the trade or calling of a hawker by selling certain articles without having a licence, as required by Tariff No. 15, Schedule 2 of Act 20 of 1884. The accused was found guilty and sentenced to pay a fine of £16 or two months' imprisonment with hard labour. His Lordship remarked that the alternative of two months' imprisonment could not be inflicted under section 6, Act 18 of 1870 ("Queen v. Sepongo," 4, E.D.C., 271). The charge was, however, sufficiently set forth in the summons. The alternative sentence of two months with hard labour would be struck out, but the proceedings would otherwise be confirmed.

WORCESTER COMMERCIAL BANK V. DE VILLIERS.

Mr. Sheil moved for the final adjudication of the defendant's estate, which was decreed.

BEIT V. BEYERSBACH.

Mr. Schreiner, Q.C., moved for a writ of civil imprisonment upon an unsatisfied judgment for £295 16s. 6d., with costs.

The defendant, who appeared in person, swore that he had no property save a few shares, that he was out of work, and unable to satisfy the debt.

In reply to Mr. Schreiner, defendant stated he had been out of work since the 6th April last, but he had been promised employment this week. The debt was contracted in Kimberley. He was willing to hand over the scrip he held in part payment.

The Court declined to make any order upon the present application, but the scrip was left in the possession of the Court.

SCHICKERLING V. BASSON.

Mr. Juta appeared for the plaintiff, and Mr. Schreiner, Q.C., for the defendant.

Mr. Juta moved for provisional sentence for £850 on an acknowledgment of debt alleged to be due as farms or commission on the sale of two farms.

It appeared from the defendant's affidavit that the plaintiff told him in September, 1890, that he wanted to sell his farms Oliphant's Kop and Jaakalskloof for £2,200.

That upon receiving this information the defendant said that he would consider the question of buying the farms at that figure.

Subsequently in October of the same year the defendant agreed to buy the farms, it being suggested by the plaintiff that he (the defendant) should take over a bond for £1,700 already

existing on the farms, that he should pay £150 to the Government and the balance (£850) he was to pay to the plaintiff, that by this means the defendant would effect a saving of £14 in transfer duty, and that the Government need know nothing about the matter.

To this suggestion the defendant replied that he was quite ignorant of such matters and must rely upon the plaintiff to do what was proper and put the sale through without bringing him into trouble; to this the plaintiff answered that it would be all right and that nothing could be done to him (defendant).

Afterwards when the contract of sale was signed, the purchase price was stated to be £1,850, and the defendant again said would it not lead to trouble as he had agreed to pay £2,200. The plaintiff again reassured him that the transaction was all right.

Subsequently the defendant signed a document acknowledging his indebtedness for the £850, but nothing was said at the time about agency or commission. This was the document now sued on.

The Chief Justice, in refusing provisional sentence, said that it would be necessary to hear the witnesses, and not only were facts in dispute but also an important question of law. The parties should go into the principal case. The costs to be costs in the cause

GOLDINGER'S EXECUTORS V. FRIEDLANDER BROS.

Mr. Schreiner Q.C., moved for judgment under Rule 819, for £250, and interest from December, 1888.

Mr. Juta said that one of his clients was desirous of defending the case, but could not do so until the arrival of his partner, who was at present in Russia.

Mr. Schreiner read the affidavit of Mr. A. G. Syfret, attorney, to the effect that full particulars of the claim had been supplied to the respondent's firm, and that undue delays had occurred. He asked for judgment, giving defendant leave to re-open the matter in August. In any event applicants were entitled to their costs, as they were perfectly justified in coming into court to-day.

The Chief Justice said the case would be set down for the 1st of August. As to the question of costs, if the plaintiffs succeeded they would have their costs, but if they failed he did not think they ought to have their costs of to-day.

BOTMA AND MARITZ V. LOUW.

Mr. Shell moved for judgment for £75 12s., with interest from 19th November, 1891, and costs. Granted.

GILLET V. NATHANSON.

Mr. Juta applied for judgment for £8 and interest.

Granted.

WALKER V. D'OLIVEIRA.

Mr. Shell moved under Rule 829 for judgment for certain costs as between plaintiff and defendant.

Judgment granted with costs.

LE SUEUR'S ESTATE V. GOLDSWORTHY.

Mr. Shell moved under Rule 829 for judgment for £32 and costs.

Judgment granted.

ADMISSIONS.

In re TRUTER.

Mr. Juta moved for the admission of Mr. Casparus Johannes Truter as a notary public. Mr. Truter took the oaths and was duly admitted.

In re NEL.

Mr. Tredgold moved for the admission of Mr. Gerrit Petrus Nel as an attorney and notary public.

The admission was ordered, the oaths to be taken before the Resident Magistrate of Burghendorp.

EX PARTE CRAIG.

Mr. Schreiner, Q.C., moved for the admission of Mr. Thomas Craig as an attorney and notary public. It appeared from Mr. Craig's petition that he was articled for five years in Scotland to a writer in Glasgow. After serving his time he was enrolled, and practised as a notary. He alleged that he was entitled to be enrolled as a practitioner in all the Courts in Scotland, but that for private reasons he had not been enrolled as a solicitor. He now claimed to be admitted as an attorney and notary of our Supreme Court.

The Court following "*Ex parte Turnbull*" (8 Juta, 80), held that Mr. Craig would have to serve one year in this colony.

REHABILITATIONS.

The Court granted the following rehabilitations: Africa Joseph Essau, Petrus François Joubert Louis Daniel Pienaar, G.L. son, and Johannes Stephanus Jordaan.

In re MARY ANN ATTWELL'S ESTATE.

Mr. Schreiner moved to make absolute the rule nisi removing William Torbet from his office of executor and trustee, and authorising the remaining executors and trustees to act in respect of the said estate.

The rule was made absolute with costs.

PETITION OF ISABELLA M. POWELL.

Mr. Shell moved for leave to petitioner to sue *in forma pauperis* in an action against her husband for judicial separation by reason of his continual misconduct.

The matter was referred to counsel for certificate.

In re SOUTH AFRICAN MUTUAL BENEFIT SOCIETY.

Mr. Shell moved for authority to the Registrar of Deeds to issue a certified copy of a certain mortgage bond for £880, passed on the 28th February, 1884, in favour of the trustees of the said society, by the pastor and deacons of the Dutch Congregational Church of Port Elizabeth, hypothecating certain ground and the buildings thereon, being Lot No. 28, at North-end, Port Elizabeth.

A rule nisi was granted calling on all persons interested to show cause why a certified copy of the bond should not be issued from the Deeds Office. A copy of the rule to be served on the pastor and deacons of the Dutch Congregational Church, Port Elizabeth. Rule returnable 1st August. One publication in *Gazette*.

In re PETRUS JOHANNES SMIT.

Mr. Shell moved for leave to petitioner to sue *in forma pauperis* in an action against his wife for restitution of conjugal rights, failing which for divorce, by reason of her malicious desertion.

The matter was referred to counsel for certificate.

In re ESTATE OF OLIVER.

Mr. Juta moved for authority for the sale of the farm Reodeplaas by public auction, and for distribution of the proceeds among the legatees, for direction as to the disposal of the minors' shares, and for leave to transfer to the surviving spouse of the said Oliver certain erf and house thereon in the village of Burghersdorp.

The order was granted.

HELLABY V. HELLABY.

Mr. Juta moved for leave to sue by edictal citation in an action against petitioner's husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion, and for custody of the children of the marriage, and for forfeiture by her husband of all his rights under the community existing between them.

Granted.

COLONIAL ORPHAN CHAMBER AND TRUST COMPANY V. LEOPOLD L. MELVILLE.

Mr. Graham moved for the extension of return day of the edictal citation to the 11th August.

Granted.

VAN NOORDEN V. DE JONGH AND { 1892.
HOFMEYER. { 12th July.

Receipt—Payments by cheque—Acknowledgment of debt—Negotiability.

Mr. Schreiner, Q.C., appeared for the applicant, and Mr. Graham for the respondents.

Mr. Schreiner moved for an order requiring respondent to deliver to applicant a receipt for the sums of money paid by him in reduction of an acknowledgment of debt, to supply to applicant a copy of the said acknowledgment of debt, and to produce the original, in order that the payments on account might be written off. This application raised an interesting question, namely, whether when payments are made by cheque a receipt can be demanded.

The facts of the case are briefly these. In 1891 Van Noorden purchased from the first-named respondent (Mrs. De Jongh) a house with the good-will and stock-in-trade of a snuff business in Loop-street, Cape Town, for £8,000, the sale being negotiated by the second-named respondent, Mr. J. H. Hofmeyr. The applicant paid on account £1,205 6s. 6d., leaving a balance of £1,794 18s. 6d. For this he signed an acknowledgment of debt, the terms of which were that he should pay Mrs. De Jongh £20 a month on account of the capital and interest on the unpaid balance at 6 per cent., he having the right at any time to pay off any part of the capital over and above £20 a month, but in the latter case the money was to be paid to Mr. Hofmeyr. The applicant alleged in his affidavit that Mrs. De Jongh signed her approval on the document, but that the arrangement had been entered into between Mr. Hofmeyr and himself. That he (applicant) believed that the said document was

negotiable, that he had asked Mr. Hofmeyr at the time to send him a copy of it, that Mr. Hofmeyr had promised to do so, but that he had not sent it. That he (applicant) had paid various sums, amounting to £289 10s., by cheque to Mr. Hofmeyr, that the latter had not cashed his cheques, nor had he given him any receipts, though he had frequently requested him to do so by letter, and had also asked to have the amounts of his cheques endorsed on the acknowledgment of debt. That money was lying in the African Banking Corporation to meet the cheques, and that he was embarrassed on account of not knowing the exact terms of the document, and was endangered in not being able to produce receipts or to ascertain that his liability had been diminished by writing off on the document itself the amounts that had been paid off, the document being, as he alleged, negotiable and still current.

Mr. Hofmeyr denied in his affidavit that he had negotiated the transaction above referred to. He denied that the applicant had the right to pay off at any time any amount of the debt in no matter how small the sums without notice, and that the deed of sale contemplated annual payments when accounts were to be framed. He denied that he had promised to send applicant a copy of the acknowledgment of debt, and alleged that it was not negotiable. That the cheques sent by applicant were chiefly for small amounts, for which he considered receipts unnecessary, and that these payments were contrary to the spirit of the deed of sale. He denied other allegations made by the applicant, and alleged that he was not bound to produce the document of debt for endorsement of payments on account, and that regard being had to the nature of the document, that cheques to order were sufficient as vouchers to prove payment.

Mr. Schreiner contended that the second-named respondent was bound to give receipts for the cheques which he had received. The acknowledgment of debt was clearly negotiable, and provisional sentence could be obtained on it. He referred to Chitty on Bills, p. 249, and cases there cited.

Mr. Graham: A receipt cannot be demanded at common law. He cited Benjamin, p. 781, and "Cole and Another v. Blake" (1 Peake, 288). The endorsement on the cheques is a sufficient receipt.

The Chief Justice remarked that as a question of some importance had been raised the Court would consider their judgment.

Postea (July 18th).

The Court delivered judgment.

The Chief Justice said that the motion had stood over from yesterday for the purpose of considering whether the document which it was

asked should be produced was a negotiable instrument or not. If it were a negotiable instrument, it must be a promissory note, which was defined by Chalmers as being an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer. The document clearly did not fall under this definition. The promise was by no means unconditional; it contained several conditions. His lordship read the document and the conditions, and expressed the opinion that it was not a negotiable instrument, and that a person who acquired it took it subject to all equities attaching to it. Continuing, His lordship said another question was raised, as to whether a creditor was bound to give a receipt for money paid by a debtor. Now, only English authorities had been quoted in the argument. Voet (46, 8, 16) discussed this question very fully, and laid down that the debtor was not bound to pay a creditor unless a creditor was prepared to give a receipt for the payment. But this did not altogether dispose of the present question. The matter came before the Court on motion. It was an application to compel the respondent first of all to deliver to applicant receipts for the sums of money paid by him, but there was no alternative claim, and the Court was of opinion that an application of this kind should not have been by motion, but by action. There should have been an alternative claim, for supposing the respondent refused to comply with the order of Court to produce the original document, or deliver receipts, he might be committed for contempt of Court. In the present case the alternative claim should have been for an order that the debt had been reduced by the amount of payments made by the applicant. The Court therefore thought that if the parties considered it worth their while to enter into litigation the applicant could do so by action, the notice of motion to stand as the summons. Costs to be costs in the cause.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 18th and
K.C.M.G. (Chief Justice), Mr. { 14th July,
Justice BUCHANAN, and Mr. { 1892.
Justice UPINGTON, K.C.M.G.}]

JANSEN V. FINCHAM.

Servitude—Transfer—Notice—*Mala fides*—
Transferee with notice of prior incum-
brance.

In the absence of mala fides a purchaser of land (or other particular successor by an onerous title) is not bound by an unregistered prädial servitude granted by his predecessor to a third person, but clear proof of express notice of the servitude to such purchaser before he bought would be sufficient evidence of mala fides.

A transferee with such notice has no greater rights as against such third person than the transferor himself possessed.

The owner of two farms, A and B, transferred A. to a purchaser with a servitude upon B., but the servitude was registered only upon the transfer deed of A. The owner afterwards transferred B. to another purchaser, but no reference was made in his deed to the servitude.

Held, in an action brought by the purchaser of A. against the purchaser of B. that in the absence of clear proof that the defendant had notice of the servitude before he purchased B., the plaintiff was not entitled to claim a rectification of the transfer deed of B. by registering the servitude therewith.

Mr. Schreiner, Q.C., and Mr. Maskew appeared for the plaintiff, and Mr. Juta and Mr. Molteno for the defendant.

This was an action instituted by the plaintiff against the defendant for registration of a servitude, for damages, and for a perpetual interdict. The declaration alleged that the plaintiff was the registered owner of half shares in lots No. 144 and No. 145 (the latter called Nooitverwacht), situated in the division of Richmond, and also of a piece of perpetual quitrent land, known as Klein Schaapfontein, situated in the aforesaid division.

That transfer of the said properties was duly passed, and executed in favour of the plaintiff, from one S. D. Naude, C. son, on the 23rd May,

1887, subject, *inter alia*, to the special conditions mentioned in a deed of sale and purchase executed by and between the plaintiff and the said Naude on the 7th September, 1886.

That the said Naude was at that time and thereafter until the 25th June, 1891, registered as the proprietor of the remaining extent of lot No. 1 of the farm Geelbeksfontein, and of the farm Schaapfontein, both situated in the division of Richmond, both adjoining lot No. 145 aforesaid.

That the said Naude died before the 5th February, 1891, and that on that day his duly-appointed executrix offered for sale by public auction, subject to certain conditions, the property last mentioned. That among the conditions of sale subject to which the said property was offered for sale was the following, that "the said property is sold under such conditions and servitudes as the said property may be subject to according to other transfers, earlier documents, and agreements."

That at the time appointed for the sale the auctioneer gave public notice of the rights reserved to, and conferred on, the plaintiff by the condition and servitude embodied in the deed of sale and purchase of the 7th September, 1886.

That no sale was effected on the 5th February, 1891, but on the 9th of the same month the defendant came to the office of the auctioneer, and there notice of the rights of the plaintiff was given by the auctioneer to the defendant, who thereafter agreed to purchase, and did purchase, the properties, namely, the remaining extent of lot No. 1 of the farms Geelbeksfontein and Schaapfontein, subject to the conditions of sale aforesaid, and subject to the rights of the plaintiff, of which the defendant had notice, but received a transfer thereof on the 25th June, 1891, which contained no special reference to the rights of the plaintiff aforesaid.

That in terms of the aforesaid deed of the 7th September, 1886, the plaintiff thereafter, and until the 10th March, 1892, enjoyed without molestation, and with the knowledge and consent of the defendant and his predecessor in title, the rights reserved to and conferred upon him by the said deed, and more particularly by the condition and servitude set forth in the 4th and 7th sections thereof, to wit: "Purchaser shall have the perpetual right to use the water which flows from the spring on the lower side of Geelbeksfontein, No. 2, *alias* Schaapfontein Veld, in the veld of Nooitverwacht, for his lands or otherwise, and to clean out the said spring and to work at it for the purpose of obtaining more water; and seller retains his right to the said water for watering not more than 1,200 sheep, 100 head of cattle, and as many ostriches as he likes."

"The spring referred to above is the spring which is at present used for irrigating the lands at the homestead of Nooitverwacht."

That on the 10th March, 1892, the defendant wrongfully and unlawfully hindered and prevented with threats of force certain servants of the plaintiff from proceeding to clear and work at the said fountain, on the land of the defendant, and thereafter the defendant wrongfully and unlawfully blocked up and kept closed a certain gateway provided for the purpose, *inter alia*, of affording access to the said fountain, and had given notice to the plaintiff that he (the defendant) refused to be bound by the aforesaid condition and servitude.

The plaintiff prayed for:

(a) An order compelling the defendant to submit to the rectification of his title or deed of transfer, dated 26th June, 1891, by the due registration thereon of a condition and servitude in terms of the 4th and 7th sections of the deed dated 7th September, 1886.

(b) £100 damages.

(c) A perpetual interdict and costs of suit.

The defendant in his plea, after admitting the formal facts, alleged that the special conditions referred to in the declaration had never been registered as against the title deeds of Naude. He denied that the conditions of sale contained any reference to such conditions. He admitted that he prevented the plaintiff from working at the fountain, and that he refused to be bound by the conditions referred to in the declaration. The defendant specially pleaded with regard to plaintiff's claim for a rectification of his (the defendant's) title deed, that after the transfer had been passed to him without any reference to the conditions above referred to, he passed a mortgage bond of £2,500 in favour of one R. Mortimer, of Richmond, over the said properties, which still stood registered against the same.

Wherefore he prayed that the plaintiff's claim might be dismissed with costs.

Issue was joined on these pleadings.

Mr. Schreiner, in opening the case, said that with regard to the mortgagee it had been arranged with him that the servitude should not in any way affect the existing mortgage, or be binding on the mortgagee or his lawful successors or assigns, who should retain all his or their rights while the said mortgage bond existed.

Mr. Jansen, the plaintiff, deposed that he bought the property from one Naude at a private sale. Before this he had never been in occupation of any part of the farm. There were then two springs and the dam. This water was all from one reef. He made a furrow commencing at the dam from one foot to 15 feet deep. He had to blast the whole of this furrow, and Naude was present when it was done, and he himself pointed out the spot, and said he would find most water there. There was vegetation growing at this place, and they could see there was water there. He commenced the new furrow in 1883, and finished it in 1889. Mr.

Naude died in December, 1890. After he died there was an auction, which he (witness) attended, together with numbers of other people. The property was not sold; he was a bidder at the sale, but knew nothing about the subsequent purchase of the property. There was a wire fence put around the property, broken in places, but his cattle drank on his ground, and he only wanted access to the dam for drinking water. In August, 1891, Mr. Fincham had a conversation with him (witness), in which he agreed to put a fencing where the old fencing had been, and to put in a gate. After that from time to time witness and his workmen went on the property, and he would say positively that Fincham knew of this, and saw it. It was necessary for him to clean out the dam occasionally. Witness's house was quite close to the fountain, but Fincham's house was twenty minutes' ride on horseback from the fountain. There was no other water, and it was necessary to get all drinking water from the fountain. Mr. Fincham on one occasion said to witness, "We must make a contract about that water." He replied, "Why make a contract?" Mr. Fincham said, "Oh, you may build on my land." Witness said, "No, my agreement will not allow me to build, but I can take water." Subsequently the gate was stopped, and he had since been unable to get at the water. The extent of the land irrigated by witness with this water was 400 or 500 morgen, and he had been unable to cultivate as much as he formerly did. He could not value the damage he had sustained. What he wanted was his rights under his agreement.

In reply to the Chief Justice, witness said he got water for drinking purposes by sending his small boy through the fence for it.

In cross-examination by Mr. Juta, witness said the present fountain was very much stronger than the old one. He could not understand what the contract was required for. Nothing was mentioned in his conversation with Mr. Fincham about water or servitude. He did not remember ever sending a messenger to Mr. Fincham with reference to the gate.

In answer to the Chief Justice, witness said he had to go on defendant's land to get his drinking water. He had not a drop of water on his place, and his farm would be valueless if deprived of this water.

Mr. P. de Villiers, attorney, of Richmond, deposed that he witnessed the agreement between Naude and Jansen. The former was his client. He was afterwards instructed by the agent for the executrix to hold a sale of the properties. Mr. Fincham came to witness as he wanted to look over the farm, and he (witness) told him he only knew of two servitudes—one of which was in favour of a neighbouring farmer, who had the right to water his cattle at a dam on the property. In a

subsequent conversation with Mr. Fincham witness read the conditions of sale, and made the same explanation as he had made at the time of sale, and told him that Mr. Jansen had a right to the water.

Messrs. P. S. Cilliers and J. G. Kuun, attorneys-at-law, also gave evidence in support of the plaintiff.

Mr. Albert Fincham the defendant, examined by Mr. Juta, stated that he remembered going with Mr. Erasmus to see De Villiers on the 9th February. On the day before he saw the farms for the first time. Nothing was said by De Villiers about servitudes. If he had known of the servitude he would not have bought the farm, which would be diminished in value by £700 or £800 if it were subject to the servitude. The conditions of sale contained no reference to the servitude. In April he raised the money from Mortimer. The gate was erected to enable Jansen to have access to the fountain, so that he could obtain water for domestic purposes. He thought of entering into a contract with Jansen about the water, but when he (witness) mentioned the matter, Jansen claimed all the water, and also the lower part of Schaapfontein. Up to this he had no knowledge of Jansen's alleged rights.

Cross-examined: His father-in-law first told him that Schaapfontein was for sale. Erasmus did not go to the sale to represent him (witness).

In answer to the Court, witness stated that Jansen had asked for the water as a favour.

Mr. J. J. Erasmus, examined by Mr. Juta, stated that he remembered the sale of the farm Geelbekfontein. At the time of the sale he was travelling agent for the Colonial Mutual Society, and was present at the sale on business, and not as representing Fincham. He remembered going to the farm Geelbekfontein on the 8th February. He was positive that at the interview in the office of Mr. De Villiers nothing was said about Jansen's servitude over Schaapfontein. He never went to see the latter farm. The first time it was mentioned was in De Villiers's office, when reference was made to it by Mr. Van Lingen, Fincham's father-in-law, who told Fincham that unless he bought Schaapfontein the other farm Geelbekfontein would be valueless. The conditions of sale were read over by Mr. De Villiers, who then handed them to witness. He (witness) then gave them to Fincham, who read them and returned them to De Villiers. The latter said nothing about the servitude on Schaapfontein. De Villiers afterwards gave the conditions to his clerk Naudé to copy. After they had been copied, De Villiers read the original and Naudé the copy for the purpose of comparing them. They were then signed. Fincham, Van Lingen, and witness then left the office. He never told Fincham anything about the servitude on Schaapfontein as he was not aware of it.

By the Court: He knew that both the farms were for sale from the advertisements in the papers.

Cross-examined by Mr. Schreiner: Mr. Van Lingen was present when the conditions were read. Witness was not Fincham's son-in-law, but he was married to Fincham's adopted daughter. Mr. Kuun had promised him (witness) £25 if he succeeded in selling Geelbekfontein. Of that amount he had only received £10. Witness did not know that there was a fountain on Schaapfontein. He entered into no arrangement with Mr. Kuun as to the sale of both farms. He was positive that Mr. Van Lingen was present in De Villiers's office when the conditions of sale were read.

By the Court: Schaapfontein was knocked down provisionally to Mr. Kuun and Geelbekfontein to Mr. Minnaar. He heard nothing said at the sale about servitudes. Mr. Fincham was a large owner of property in Hope Town, but as he wanted a small property in Richmond, witness advised him to buy Geelbekfontein.

Mr. Minnaar deposed that he attended the sale of Geelbekfontein, which was knocked down to him provisionally for £1,800. He heard nothing said at the sale about a servitude in favour of Mr. Jansen.

Cross-examined by Mr. Schreiner: Mr. De Villiers might have made reference to the servitude on Schaapfontein, but he did not notice it. He was buying Geelbekfontein, and had no interest in Schaapfontein.

Mr. Kuun, recalled, in reply to the Chief Justice, said that Erasmus's evidence was not quite correct. He offered Erasmus £25 for effecting the sale of the two farms, but he only paid him £10 because he only asked for that amount. It was only at the sale he heard about the servitude.

Mr. Schreiner reviewed the evidence at length, and contended that the defendant must have had notice of the servitude. He referred to the following authorities: "*Richards v. Nash*" (1 Juta, 212); "*Judd v. Fourie*" (8 E.D.C., 41); "*Stewart's Trustees v. Uniondale Municipality*" (7 Juta, 110); "*Pretorius's Executors v. Burger's Executors*" (8 Roscoe, 26); and "*Hefmeyr v. De Waal*" (1 Juta, 424).

Mr. Juta was heard for the defendant.

The Chief Justice, in giving judgment, said: The defendant Fincham has admittedly received transfer of the farm Schaapfontein, purchased by him from the executrix of Naudé. In that transfer no reference is made to any servitude in favour of the plaintiff's adjoining farm Nooit-verwacht. The plaintiff had purchased this farm from Naudé with a somewhat complicated servitude in respect to a certain dam and spring feeding the dam situated on his farm Schaap-

fontein, which then still belonged to Naudé. This servitude was registered with the transfer to the plaintiff but was omitted to be registered as against the servient tenement. If this unfortunate omission had not occurred no question could have arisen as to the binding nature of the servitude upon the defendant's land. The effect of registration would have been to carve out of the defendant's rights of ownership certain limited but real rights affecting his land and to transfer them to the plaintiff. It would have been no answer for him, as against the plaintiff's claim to exercise those rights, to say that he had no notice of the servitude. The registration against the transfer deed was notice to him. Before he bought he could not be expected to examine the plaintiff's transfer in the Deeds Registry, but he must be presumed to have had knowledge of any incumbrance registered against the land intended to be purchased by himself. Whatever claims he might have had against the vendor of the farm he could not object to the exercise by the plaintiff of his duly-acquired real rights. But as I have said, the servitude was not registered as against the defendant's farm. The object of this action is to have the defendant's transfer amended by registering the servitude against his farm, on the ground that the defendant, before and at the time that he purchased the farm, had express notice of the plaintiff's claim to the servitude.

The defendant acquired transfer not as heir, or legatee, or donee, but by an onerous title. In fact he paid full value for the farm. That being so the question arises whether he can, under any circumstances, be compelled to submit to a rectification of the transfer at the suit of a neighbouring landowner who claims a servitude upon his land. That question has in effect been answered by the decisions in "*Richards v Nash*" (1 Juta, 812) and "*Judd v Fourie*" (8 E.D.O. 41). If the defendant before he bought had such distinct notice of the plaintiff's prior claim that it would be in the nature of a fraud on the part of the defendant to take advantage of the omission to register the servitude against his farm, the Court would relieve the plaintiff by supplying the omission. It is obvious, however, that such relief would not be granted in doubtful cases. The plaintiff could have protected himself by refusing to take transfer unless and until the servitude was registered against the servient tenement. If his legal advisers in connection with this transfer neglected their duty he may have his remedy against them, or he may have a claim against the executrix of Naudé for damages sustained in consequence of his not having acquired the rights which he had bought. So long as the farm Schaspfontein stood registered in Naudé's name the defendant had a *ius in personam* against Naudé, and after his death against his executrix,

to enforce due registration of his servitude. But as between the plaintiff and defendant there is no privity of contract. It is as the particular successor of Naudé that defendant acquired his rights of ownership. If those rights were acquired *bona fide* and for value the absence of registration is fatal to the plaintiff's claim. If, however, these rights of ownership were not acquired *bona fide* or for value, the defendant cannot as against the plaintiff claim greater rights than Naudé himself possessed. This is the simple ground on which the doctrine of notice rests. If the defendant before he purchased had notice of the plaintiff's rights as against Naudé's estate it would be in the highest degree inequitable to allow him to defeat those rights by taking a transfer which wholly ignores those rights. On the other hand it is obvious that a transfer deed once passed in solemn form should not be lightly tampered with. As the main object of registration is notice, an intending purchaser of a farm who finds that no servitude is registered against such farm, may fairly conclude that no such servitude exists. When once therefore he has obtained a clear transfer of the farm he ought not to be deprived of the benefits of such transfer without the clearest proof of his knowledge before purchase that the servitude had been intended to be created. Such proof was given in the case of "*Richards v Nash*" as well as in "*Judd v Fourie*." Is such proof forthcoming in the present case? The sale to the defendant was effected through the agency of the same attorney who had been employed to effect the sale to the plaintiff. He states, and he is supported by two of his clerks and two other witnesses, that when reading the written conditions of sale to the defendant he informed defendant of the servitude in favour of plaintiff's farm. The defendant and two of his witnesses who were present in the attorney's office at the time when the conditions were read, positively deny the statement. It is most difficult to decide between the two conflicting statements, but the broad fact remains that the conditions of sale were silent as to the servitude. The plaintiff's case is that the attorney attached considerable weight to the existence of the servitude and wished to impress the defendant with the knowledge of the servitude. But what would have been simpler, if the matter had been present to his mind, than to insert a few words relative to the servitude into the conditions of sale? These conditions were sent for approval to another attorney, who assisted the executrix in the administration of Naudé's estate, and he also accepted them without demur (After commenting upon the evidence generally, the Chief Justice added): In the absence therefore of satisfactory proof that the existence of the servitude was brought to the defendant's knowledge before he agreed to purchase the farm

Schaapfontein, I am of opinion that judgment should be in his favour with costs.

Mr. Justice Buchanan and Mr. Justice Upington concurred.

[Plaintiff's Attorney, Paul de Villiers; Defendant's Attorneys, Fairbridge & Arderne.]

SUPREME COURT.

(IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice BUCHANAN.] { 20th July, 1892.

ADMISSIONS.

Ex parte BUCHANAN.

On the motion of Mr. Schreiner, Q.C., Mr. William Porter Buchanan was admitted as an advocate of the Supreme Court.

Ex parte HUTTON.

On the motion of Mr. Graham, Mr. Frederick Augustus Hutton was admitted as an advocate of the Supreme Court.

In re WRIGHT'S SETTLEMENT.

On the application of Mr. Webber, authority was given to the trustee under the ante-nuptial contract of Richard W. Wright and Dora M. Drennan to sell certain farm called Blackwood, in the division of Queen's Town, and to invest the proceeds for the benefit of the trust.

In re POTGIETTER'S INSOLVENT ESTATE.

Mr. Tredgold moved for the appointment of a commission to take the evidence of Hercules Ferreira and others concerning the removal of certain estriches, believed to be the property of the estate, and for the production of the contract relating to the purchase of the birds.

The order was granted.

SMIT V. GABIER.

Costs—Petition—Rule nisi—Practice.

In making absolute a rule nisi the Court refused to give costs, there being no prayer for costs in the petition on which the rule had been granted.

Mr. Juta moved to make absolute the rule nisi restraining the respondent from obstructing the common passage reserved for certain portions of the property known as Marais' Cooperage, between Loop, Bree, and Bloem-streets, Cape Town. There was no prayer for costs in the petition on which the rule nisi was granted, nor had a copy of the petition been served on the respondent, but the rule had been duly served.

The Court made absolute the rule nisi, but refused to give costs, as they were not asked for in the petition or in the rule. The applicant to make a further application for costs.

KAUFMANN V. SCHUSTER.

Mr. Graham moved for a rule nisi calling upon the respondent to show cause why she should not be declared of unsound mind and incapable of managing her person and property, and for the appointment of a *curator ad litem* in the proceedings about to be instituted.

The Court granted the rule, and appointed Mr. Tredgold *curator ad litem*.

POWELL V. POWELL.

Mr. Sheil moved for a rule nisi requiring the respondent to show cause why the applicant should not be admitted to sue him *in forma pauperis* in an action for a judicial separation.

The order was granted; rule returnable on the 1st August.

SMIT V. SMIT.

Mr. Sheil moved for a rule nisi requiring the respondent to show cause why the applicant should not be admitted to sue her *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

The order was granted; rule returnable on the 11th August.

IN THE ESTATE OF THE LATE WILLEM J. BURGERS.

Mr. Juta moved for authority to the executrix testamentary to dispossess of certain farms, the property of the estate, known as Langfontein and Moordendal, in the district of Graaff-Reinet,

and to apply the proceeds in satisfaction of a mortgage bond due by the estate, and of the purchase price of the farm Rietvley, bought by the said Burgers, who died, however, before the transactions he intended to carry out could be effected.

It appeared from the petition that the late Mr. Burgers and his wife executed a joint will, by which the survivor and the children were appointed heirs of the first dying, the survivor to remain in possession. The testatrix was to have a life interest in the Graaff-Reinet farms, but she was not to sell or alienate them; but if at the testator's death the farms were mortgaged, she was to pay off the mortgage bond and was at liberty to sell the other landed property in the estate for that purpose, so as, if possible, to leave the farms free and unincumbered at her death, on which event they were to be sold, and the proceeds divided amongst the children and their descendants. Mr. Burgers and his wife subsequently executed a codicil by which they bequeathed certain other farms to certain sons for £4,000, payment for which was to be made at the death of the testatrix. Being anxious to remove to the Richmond district, where the farms referred to in the codicil were situated, and to settle with his family there, the testator bought a farm, Rietvley, in the Richmond district, for £2,650, which sum is still owing. He mortgaged the Graaff-Reinet farms for £2,650, and he gave instructions to have the latter farms sold and with the proceeds to pay off the mortgage bond and the purchase price of the farm Rietvley, £2,650. Before these instructions could be carried out the testator died, leaving him surviving the testatrix and a number of adult and minor heirs and legatees. In addition to the mortgage bond and the debt on the farm Rietvley, there were further debts amounting to £750 due by the estate at the date of the testator's death, the only assets being the farms above referred to, and farming furniture and stock valued at £1,900.

The testatrix now asked for authority to carry out the wishes of the testator, namely, to sell the farms in the Graaff-Reinet district, and with the proceeds to pay off the mortgage bond and the purchase price of the farm Rietvley.

All the major heirs consented to this course, and the Master reported that it would be to the interests of the miners to carry out the proposed arrangement.

The Court granted the necessary authority.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, (K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.) 21st July, 1892.]

REGINA V ROBERTSON.

Liquor Licensing Act, 1883 — Permitting drunkenness—Sale to child—Condition—Sale to natives.

On a charge against the holder of a liquor licence for permitting drunkenness or violent conduct upon his premises it is no valid defence that he was too busy attending to other customers. It is the duty of licensed persons to avail themselves of the powers given to them by the 78th section of Act 28 of 1883 for the prevention of such conduct.

Where it is clearly proved that the parent of a child under fifteen had sent such child to buy liquor from a licensed person and that the child bought the liquor for its parent;

Held that such licensed person cannot be convicted of selling to such child in contravention of the 6th sub-section of the 73rd Section.

Held, further that the burthen of proving that liquor delivered to such a child was really sold to some other person to whom it is lawful to sell lies upon the person so delivering the liquor.

It is not within the competence of the Licensing Court under the Act 28 of 1883 to insert into any retail licence authorising the sale of liquor between certain hours a condition having the effect of prohibiting the sale of liquor to natives between those hours.

Mr. Graham appeared for the Crown, and Mr. Schreiner, Q.C., for the appellant.

This was an appeal from a sentence of the Resident Magistrate of Port Elizabeth, and raised questions of much importance to licensed victuallers and others. The accused was charged with contravening paragraph 1, section 73, Act 28 of 1883, and paragraph 6, section 73, Act 23 of 1882, as amended by section 19, Act 25 of 1891, and paragraph 7, section 73, Act 28 of 1883.

Firstly,—In that upon or about the fourth day of June, 1892, and at Port Elizabeth, the said

Peter Robertson did wrongfully and unlawfully permit drunkenness and violent, riotous, and quarrelsome conduct to take place upon his licensed premises known as the Prince of Wales Hotel at Port Elizabeth aforesaid.

Secondly,—As also in that upon the said day and date, and at the place aforesaid, he, the said Peter Robertson, did wrongfully and unlawfully sell, or knowingly permit to be sold to persons under the age of fifteen years, to wit, Lavinia Wilson and Robert Wilson, liquor, to wit, brandy.

Thirdly,—As also in that upon the said day and date, and at the place aforesaid, he, the said Peter Robertson, did wrongfully and unlawfully keep the tap or native canteen of his licensed premises, to wit, the aforesaid Prince of Wales Hotel, open for the sale of liquor, or sell or expose liquor for sale during a time, to wit, 9.20 p.m., when he was not authorised by his licence to sell, and did then and there sell or dispose of, or cause to be sold or disposed of, certain spirituous liquor, namely, brandy.

The prisoner was found guilty, and sentenced to pay the following fines: £1 for contravening section 78, paragraph 1; £5 for contravening section 78, paragraph 6, and £4 for contravening section 78, paragraph 7.

Henry Lionel Creed gave the following evidence: I am an inspector of licensed premises under Act 25 of 1891. I know the accused. On the 4th June, 1892, I was in company with Mr. R. M. Orpen in Walmer-road a little after nine p.m., when opposite to the hotel kept by the accused I saw some men and a woman fighting. Then one of the men entered the bar of the canteen. I saw the accused behind the bar. Shortly after the other man and the woman who were drunk entered the canteen kept by the accused, and the canteen then became a scene of riot and uproar. I watched the accused and he made no effort to restore order. This was in the canteen portion of the hotel. While this was going on I saw two children enter the canteen bar, viz., a girl about twelve years of age, and a very small boy. They went up to the counter, and about two minutes afterwards I saw the accused hand the girl something. The little boy took a coin out of his pocket and placed it on the counter. The children then left the canteen, and I asked the accused why he permitted drunkenness and violent conduct on his licensed premises. He replied that he had been very busy serving people in the adjoining bar. There were then in the canteen two women, one of whom was drunk, and five men, two of whom were drunk. Accused then at once turned all these people out of the canteen. I then went outside and found the two children there. I asked the girl what she had bought, and she produced a bottle containing liquor of some sort.—I took the children back into the canteen,

and in the presence of the accused I opened the bottle and found it to contain Cape brandy. The girl said she had paid threepence for the brandy. The accused admitted the sale, and pointed to a small tumbler as the measure of the quantity sold to this child. I then took down the names and ages of the children—Lavinia Wilson, aged twelve years, and Robert Wilson, aged five years. Accused told me that he was not aware that there was any provision in the Act forbidding the sale of liquor to children. I then left the premises. When I entered the canteen it was about 9.15 p.m. by my watch, and my watch was five minutes slow by the town clock. I did not see any clock in the canteen. I asked the accused whether he was not bound to close his canteen at seven p.m.

Cross-examined by Mr. Attorney Chabaud: I was out on my inspection on the 4th June, 1892. I was not there to entrap anyone. My desire was to see whether anyone contravened any section of the Act. When I saw the man and woman fighting outside the hotel, good order apparently prevailed inside it, and the riot and uproar were caused by the entrance of these people. I did not enter for eight or ten minutes afterwards. I remarked that the row had been going on for about ten minutes. The men were pushing each other about and quarrelling. I was quite close to them. I do not know what they said. I cannot say what language they spoke. The other men who were in the canteen then took part in the row. They tried to force one of the drunken men into a seat. The canteen and bar are all under one roof. I know part of the premises of the Prince of Wales Hotel. It is all, I believe, under one roof. The children gave their ages. I cannot swear to these ages. I can only say that they are under fifteen. I do not say that the brandy was intended for consumption by these children, but that they were sent by their parents to obtain it. There are two entrances to these premises. On entering the one you find a partition running from the outer wall to a counter. There is no partition between the counter and the back wall. There is not, to the best of my recollection, an opening in the partition in front of the counter. I cannot say that there is or is not.

Robert M. Orpen corroborated the evidence of the last witness.

Elizabeth Wilson, sworn, stated: I am the mother of the little girl Lavinia Wilson. I sent her to Mr. Robertson (the accused) on the 4th June, 1892, for 8d. worth of brandy. I am in the habit of sending her on messages.

Cross examined: I have not sent the little girl before. My husband may have done so. If I have nobody else to send to a canteen, I must send my little girl.

Peter Robertson, sworn, stated: I am the accused. I remember the night when the witnesses Orpen and Creed visited my hotel. There was no riotous conduct in the hotel. I had not served any person with liquor. I did not see the quarrelsome people come in. I was in the private bar. When Creed came in I was entering the bar. I had no time to eject the quarrelsome people. This bar is all in one room. In the middle there is a partition; in the middle of the partition there is a door, so that you can pass from one bar to the other. You can see from one bar to the other. At the time the liquor was sold to the little girl she told me it was for her mother. At the time that I accepted the licence I protested against the conditions to Mr. Roselt.

Cross-examined: I did not go to the Magistrate or Assistant Magistrate to make my protest. I merely said to Mr. Roselt, "I protest against these conditions." I heard the evidence of Mr. Creed and Mr. Orpen. I served the children before the drunken people returned to the canteen. I was about to invite Mr. Creed into my private bar when first he came in, because the place where he was in was my public bar, where I serve only the coloured people.

The following are the conditions referred to by the accused in his evidence, and to which he said he objected when his licence was handed to him: "That the native canteen or bar open at nine a.m. and close at seven p.m., and if liquor is sold in the bar or canteen to natives the hour of opening and closing be from nine a.m. to seven p.m. respectively, i.e., it comes under the definition of a native canteen or bar, and that proper urinal pans be provided and a lamp kept burning at night over the door of the licensed premises."

Mr. Schreiner, after reading the record, said as to the first charge, in order to convict under sub-section 1 of permitting drunkenness, the consumption of liquor by a drunken person must be shown; and in order to convict of violent, riotous, or disorderly conduct, it was necessary to show not merely that the accused knew of such conduct, but that he acquiesced in it. There was no proof of consumption of liquor by disorderly persons in the present case, and it was not satisfactorily proved that the accused had his attention drawn to the row. As to the second charge, the question is does the doctrine *qui facit per alium facit per se* apply to determine who was the buyer for the purposes of sub-section 6. The word "sell" implies a contract, and a buyer as well as a seller. If any person acting as agent for another with due authority purchased any article the principal and not the agent was the buyer. That the Legislature did not intend to render the holder of a licence criminally liable for supplying or delivering liquor a child, as agent or messenger, can be inferred from a comparison of the language of

the sub-section with that of section 22, where the holder of a licence is prohibited from selling, supplying, or giving any liquor to any aboriginal native. Counsel referred to the Diamond Trade Act, where the sale or purchase either as principal or agent is rendered highly penal. In the circumstances of the country many servants are under fifteen years of age, and it could not have been the intention of the Legislature to prevent a master from sending such a servant to obtain liquor from the holder of a retail licence, or from the holder of a bottle-store licence. He admitted that the onus would be on the seller of proving that the child acted as agent or messenger, the presumption being that the person purchasing purchased as principal. In this case the facts were not in dispute. It was clear that the mother had sent the girl to fetch some brandy on an occasion of illness. He referred to the case "*Regina v. McWilliams*," recently decided in the Eastern Districts Court, the record of which was put in by Mr. Graham. With regard to the third charge, he read and commented upon the terms of the licence. The accused had paid for midnight privileges, which entitled him to keep open from nine p.m. to eleven p.m. Endorsed on the licence appeared the so-called conditions, which were unsigned, and of which no note was preserved on the register. Counsel was instructed that the Magistrate had framed these conditions himself, and that they were not set forth in the records of the Licensing Court, which had adopted certain general resolutions; if so, the Magistrate exceeded his functions. But even if the Licensing Court were taken to have imposed these conditions, the accused could not be convicted if the conditions were *ultra vires* he had, in fact, protested when taking out his licence, and he could not by any waiver render himself liable to a criminal prosecution for not observing an illegal condition. This was not a condition restricting the place of sale, nor generally restricting the time of sale; it was a restriction on the sale of liquor to natives as distinguished from other persons; such class or colour distinction could only be created by the Legislature, not by the Licensing Court. The Act of 1883 provided for the proclamation of areas, but gave no power to Licensing Courts to impose conditions otherwise than under sub-section 2 of section 7, and section 88, and the Act of 1891 does not confer such power. Counsel referred in the course of argument to the following cases: "*Pearson v. The Uitenhage Licensing Court*" (5 Juta, 863); "*Regina v. Transfeldt*" (5 Juta, 181); "*Regina v. Heydenryck*" (2 E.D.O. 248), and "*Regina v. Smith*" (8 E.D.O., 409).

The Court having intimated that it was unnecessary to hear counsel for the Crown on the first point,

Mr. Graham addressed himself to the other two charges. He referred to a telegram which had been received from the Resident Magistrate of Port Elizabeth, in which it was stated that the conditions endorsed on the appellant's licence were the general conditions endorsed on all licences. The conditions were not imposed by the Magistrate of his own motion. The maxim *Omnis presumuntur rite esse acta* applied. The words native canteen or bar were purely descriptive, and no question of class or colour was raised. He referred to "Catton v. The Licensing Court of Uitenhage" and to the "Queen v. Transfeldt" (5 Juta, 181). With regard to the second charge, it was clearly the intention of the Legislature to close the doors of canteens to persons under the age of fifteen. The common law meaning of the word sale did not apply.

The Chief Justice, in delivering judgment, said: The appellant has been convicted on three counts. The first charges him with having on a certain day wrongfully and unlawfully permitted drunkenness, and violent, riotous, and quarrelsome conduct on his premises in contravention of Act 28 of 1888, section 78, sub-section 1. The question is one of fact and, in my opinion, the Magistrate had ample grounds for convicting the appellant. The appellant himself, in his evidence, did not seriously deny that there was an uproar on the premises, and his only excuse for permitting it to go on was that he was too busy attending to his other customers. This certainly is no valid defence. The 78th section gives licensed persons the largest possible powers for the prevention of drunkenness or violent conduct upon their premises, and it is their bounden duty to avail themselves of those powers. If they prefer to attend to their other customers while they could have prevented improper conduct they must be held to have permitted it.

The second count charges the appellant with having sold liquor to a child under fifteen years of age in contravention of the 6th sub-section. The evidence is clear and conclusive that the child had been sent by its mother to buy the liquor and told the appellant so. In my opinion, the sale was not to the child. If the Legislature intended to prevent the delivery of liquor to children, it would, or at all events should, have made it quite clear. Where aboriginal natives in a proclaimed area are concerned the Act is quite clear, for it prohibits the selling, supplying, or giving of liquor to such natives. So also by the Diamond Trade Act (No. 48 of 1882) it is declared unlawful, without the proper licence, not only to sell, but also to barter, pledge, or deliver any rough or uncut diamond. In the present case the appellant did no more than deliver the brandy to the child, who had been sent by its mother to buy it for her. I am prepared to hold that the burden of proving

that liquor delivered to a child under fifteen was really sold to someone else, to whom it is lawful to sell, lies upon the person so delivering it, but when once this has clearly been proved he cannot be found guilty of a contravention of the sub-section. The conviction upon the second count must therefore be quashed.

The third count charges the appellant with having wrongfully and unlawfully kept the tap, or native canteen, of his licensed premises open for the sale of liquor, during a time, to wit 9 20 p.m., when he was not authorised by his licence to sell, in contravention of the 7th sub-section of section 78. The prohibition to sell at that particular time and place arises out of a condition attached to the licence, to the effect that the native canteen, or tap, should be kept open between the hours of nine a.m. and seven p.m. The body of the licence itself, however, authorised the sale of liquor by retail between seven a.m. and nine p.m., with midnight privileges authorising the holder to keep his premises open until eleven p.m. Practically therefore the Licensing Court has drawn a distinction, in granting the licence in question, between natives and Europeans, &c., and has allowed the appellant to sell to the latter at a time when he could not sell to the former. If such a condition were permissible, a condition prohibiting the sale of liquor to natives at any time of day would be equally permissible. The Legislature has, however, found it necessary to make special provisions for the case of aboriginal natives, by allowing the Governor, under the 21st section, to proclaim areas within which liquor shall not be sold to such natives. It is clear from the second sub-section of section 7, and from the 88th section, that Licensing Courts may impose conditions of certain kinds upon which retail licences may be granted, and the question is, whether the condition we are now dealing with is one of them. On behalf of the prosecution reliance is mainly placed on the case of "Queen v. Transfeldt" (5 Juta, 181), but that case by no means supports the validity of the conditions now in question. There it was held that a condition "that liquor may be sold after nine o'clock and up to midnight within the hotel and billiard-room to persons frequenting and being in such hotel or billiard-room" was not *ultra vires*. It is quite true that the condition restricted the privilege to "the class commonly admitted to the *table d'hôte* of such hotel" but the case was decided quite independently of this restriction. A Hottentot boy had been sent to buy the brandy, but in my judgment it was expressly said that it made "no difference whether it was a Hottentot boy or a respectable farmer." Neither would "have fallen within the condition," which the Court upheld, that the person supplied with liquor must be a person frequenting and being in the hotel or

billiard-room. The present condition goes very much further than any condition that has been under the consideration of the Court. It may be extremely advisable that a distinction of race or colour should be made in the sale of intoxicating liquors, and if there were any indications in the Act of an intention to authorise such a distinction, the Court would in the interest of temperance give effect to such intention. But I can find nothing in the Act from which such an intention can in the remotest degree be inferred. On the contrary, by expressly giving the Governor the power to which I have already referred, the Legislature rather seems to preclude the motion of its having intended to confer on Licensing Courts the power of preventing a licensed person from selling liquor to natives at a time when the licensee authorises him to sell or expose liquor for sale. The conviction upon the third count must therefore also be quashed.

Mr. Justice Buchanan and Mr. Justice Upington concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinne.]

LIND AND OTHERS v. CALITZ AND { 1892.
OTHERS. { 21st July.

Costs—Taxation—Review.

Mr. Tredgold appeared for the applicants, and Mr. Schreiner, Q.C., for the respondents.

This matter was a petition for the review of the taxing of the defendants' bill of costs in the above matter. The original action was one for ejectment from a certain farm in the Oudtshoorn district. The Court on the 14th of June last gave judgment against three of the defendants with costs, save and except certain costs incurred by the plaintiffs, and made an order requiring three others to quit possession of the farm on payment of compensation, plaintiffs to pay their own costs, and judgment with costs for the seventh defendant. The defendants' bill had been taxed, but the plaintiffs (now applicants) objected to certain items, and further contended that they were only liable to pay four-sevenths of the total bill. The second point was the one mainly relied on by the plaintiffs.

Mr. Tredgold moved for the applicants, and contended that the whole bill must be taken as representing the joint costs of the defendants, and that each was liable jointly for his share. Judgment was against three of the defendants, and it would be unjust and an anomalous position to expect the plaintiffs to pay the share of the costs of the unsuccessful defendants when they themselves had been condemned to pay the plaintiffs' costs. If each of these three had had separate

attorneys they would each have had to pay their own costs. The policy of the Court was against severing defences. They must however be held to be liable jointly for their shares. The proper course would be to allot the particular items of expense incurred by each defendant to him, and then divide the general costs between them. He quoted: "Brink and Holm v. Chalmers and Others" (1 Foord, 180); "Norman v. Climenson and Others" (4 M. and G., 248); "Gambrell v. Earl of Falmouth" (5 A. and E., 408); "Redway v. Webber and Algar" (82 L.J.C.P., 84); "Griffith v. Jones and Others" (2 C.M. and R., 888).

Mr. Schreiner, Q.C., for the respondents, argued that if each had had separate attorneys, the plaintiffs would have had to pay a separate amount for each defendant. The extra three defendants do not increase costs. The bill would be the same if there had been only four defendants. The items incurred by the defendants condemned to pay costs have been excluded. The whole contention of the plaintiffs would tend to a severance of defences. The plaintiffs had practically failed, and the original case showed they deserve but little consideration. The costs are no greater because more parties are joined in a common defence.

Mr. Tredgold, in replying, submitted that it was not for the defendants to make profit out of their costs, as would be in this case if they were paid as respondents contended. The three defendants were put in a better position by not severing, and there could be no inducement to sever if applicants' contention were correct.

The Chief Justice, in giving judgment, said the Court would confine itself as much as possible to the position it took up when judgment was given in the original case. It was not necessary to lay down any general rule as to costs; but, in his opinion, the taxing officer had entered fully into the spirit of the order, and inasmuch as the result was not against the letter of the order, he thought the Court should not disturb the Taxing Master's ruling. The application must be dismissed with costs.

[Applicants' Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondents' Attorney, C. C. de Villiers.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, {
K.C.M.G. (Chief Justice), Mr. 26th July,
Justice BUCHANAN, and Mr. 1892.
Justice UPINGTON, K.C.M.G.]

REGINA V. ISAAC GOLDMAN.

Liquor Licence—Act 28 of 1883, Section 73,
Sub-section 6—Alleged contravention—
Fine—Conviction quashed on review.

The Chief Justice referred to this case, which had come before him on review from the Resident Magistrate of Willowmore. The accused was charged with the crime of contravening Act 28 of 1883, section 73, sub-section 6, in that upon or about the 27th of June, 1892, he did wrongfully and unlawfully sell, or knowingly permit to be sold, to one Frickie Jantjies (a boy apparently under the age of fifteen years), half a bottle of Cape brandy. The prisoner was found guilty and sentenced to pay a fine of £7, or undergo one month's imprisonment with hard labour. The following evidence was given :

Frickie Jantjies, duly cautioned, stated : I know the accused. He lives at the hotel. I know his hotel, but do not know the name of the same. Monday last week I went to his hotel to buy brandy. I went into the canteen and asked for 1s. worth of brandy, and I got half a bottle. I asked the young fellow behind the bar (witness here pointed out the boy who sold the liquor—Robert Henry Bailey—in court). I paid 1s. for the half-bottle. The young fellow who gave the brandy asked me for whom the brandy was. I told him for my mother. I had no bottle; he gave me brandy in a half-bottle. The bottle produced is the one I got. I went outside and gave it to Henry Macongo. He was a little way off. We two then came to the Resident Magistrate's office, where I gave my statement. I did not fetch the brandy for my mother. Henry Macongo gave me the shilling to buy the brandy.

The Chief Justice, after referring to this evidence, said that he had attached the following memo. to the record : The boy Frickie Jantjies told the barman that the brandy was wanted for his mother. According to the decision in "The Queen v. Robertson," if the brandy was really bought by one entitled to buy brandy the publican would not be guilty of selling to the child.

The Court added that the burden of proving that the liquor was really bought by someone else than the child lay upon the publican. In the present case the child spoke an untruth in saying that the brandy was wanted for his mother. If the

child had really bought the brandy for himself the publican would clearly have been guilty, for notwithstanding the child's statement, the sale would have been to the child, and not to the mother. In point of fact, however, the child had been employed by a constable to buy the brandy. The money was paid by the constable, and the brandy was brought to the constable untasted by the child. There was therefore no sale to the child, and the conviction must be quashed.

REGINA V. MAREN.

Mr. Justice Buchanan mentioned this case, which had come before him on review from the Resident Magistrate of Prieska. The accused was charged with contravening section 4, Act 20 of 1884, in that between 31st May and 30th June, 1892, he carried on at his premises in Prieska the business of a general dealer in Colonial tobacco without having a licence as by law required. The accused was found guilty, and fined £5 1s. His lordship remarked that the conviction must be quashed, as it was unnecessary to have a licence to deal in Colonial produce.

Ex parte KEMLO.

Mr. Schreiner, Q.C., moved for the admission of Mr. Alexander Kemlo as an attorney for circuit courts under the 198th rule of Court.

The Court allowed the admission, the oaths to be taken before the Resident Magistrate of Butterworth.

REINERS VON LAER AND CO. V. { 1892.
FEHR. { 26th July

Trade Mark — Registration — Resemblance calculated to deceive.

Upon the label registered as the trade mark of one manufacturer's beer was the device of a bright orb.

Subsequently a label for the beer of another manufacturer with the words "original sun-brand" was ordered to be registered, but upon its being ascertained that the bright orb had been described by the first manufacturer in his application for registration as representing the sun, which it in fact did, the Court revoked the order for the registration of the second label with the words "original sun-brand" on the ground that it so nearly resembled the first in terms of the 6th section of Act 22 of 1877, as to be calculated to deceive.

Mr. Sheil appeared for the applicants, and Mr. Juta for the respondent.

This case raised an interesting question, and one of much importance to merchants and others interested in trade marks. The facts are briefly these :

In December last the applicants, who carry on the business of general merchants at Port Elizabeth, applied under Act 22 of 1877 to the Registrar of Deeds for registration of a certain trade mark for lager beer.

The trade mark which they applied to have registered consisted of a label having at the top a gilt star, and beneath this device the words "Lager Beer, Original Sun Brand."

Notices of their application appeared in the *Government Gazette* of the 16th and 22nd December.

On the 28th December an objection was lodged with the Registrar of Deeds by the respondent, through his attorneys (Messrs. Scanlon & Syfret), on the grounds that the trade mark which the applicants sought to register was an infringement of the respondent's label, which had been registered in June, 1888, which appears on his beer, and which is well known throughout South Africa as "Sun Brand Lager Beer," so called from the device of a brilliant sun which appears on the label.

Upon this the Registrar of Deeds refused to register the applicants' trade mark.

Thereafter, on the 12th April, the applicants applied to the Court for leave to register their trade mark. This application was opposed by the respondent, and after the case had been fully argued, the Court held that the applicants were entitled to have their trade mark registered provided they removed the star which appeared on their label, the Court being unanimously of opinion that the words "Original Sun Brand," which appear on the applicants' label, were not calculated to deceive.

Afterwards the respondent obtained leave to appeal to the Privy Council from the order of the 12th April, the applicants to have leave to use their trade mark as registered.

Thereafter on the 29th June the Court intimated that having ascertained since the making of the order of the 12th April that the respondent's application for the registration of his trade mark had specified the representation of the sun as a distinctive feature of his label, argument was desired upon the questions :

(a) Whether the use of the words, "Original Sun Brand," on the applicants' subsequent trade mark does not create such a resemblance to the respondents' mark as to be calculated to deceive, and therefore

(b) Whether the order of the 12th April directing the Registrar of Deeds to register the applicants' trade mark should not be revoked.

These points now came on for argument.

Mr. Sheil said : Before proceeding to argue the points which have to be discussed to-day, I should like in a few words to explain the position which the applicants take up in the present proceedings. In deference to an expressed wish of the Court we came here to re-argue this case, but in doing so we must not be taken as consenting in any way to a revocation of the order of the 12th April last. That judgment stands in our favour. On the strength of that judgment our trade mark was registered. Relying on that judgment we have placed large orders in the European markets, extensive consignments of our beer, labelled with our trade mark, are now on the water, and it is clear that if the order of the 12th April is to-day revoked we shall suffer heavy loss. For these reasons we cannot consent to the revocation of the judgment of the 12th April.

The Chief Justice : Do you object to discuss the questions ?

Mr. Sheil : No. We come here to re-argue the case in deference to the wishes of the Court, but at the same time we wish to place on record our objection to a revocation of the order of the 12th April.

Mr. Justice Buchanan : If any order of the Court is given without knowledge of certain facts, it is not a judgment, but a direction.

Mr. Sheil : Does your lordship intend to convey that the order of April 12 was merely an interlocutory order ? If so, then I submit with much respect that the leave given to the respondent to appeal to the Privy Council was granted *per incuriam*, and should now be revoked.

The Chief Justice : If a direction is given to the Registrar of the Court, and on fresh evidence the Court considers it a direction which should not have been given, isn't it competent to revoke it ? It is not in the nature of a judgment between parties, but a direction to the Registrar. There are now certain facts before the Court which were not before it when the direction was given.

Counsel then proceeded to argue the points submitted. He said : The first point the Court has now to determine is, do the words "Original Sun Brand" on the applicants' label create such a resemblance to the respondent's trade mark as to be calculated to deceive ? If this question is answered in the negative then it will be unnecessary to argue the second point. In considering this question I should like, at the outset, to cite a dictum of the late Master of the Rolls, Sir George Jessel, in the case of "Ellis & Sons v. Ruthin Sodawater Company," referred to by Sebastian in his valuable work on Trade Marks, pp. 187-188, and which, I think, will have a very considerable bearing on this case. Sir George Jessel, in his judgment in that case, said : "As I understand the Trade Mark Act, if you come for trade mark and not for actual fraud, you can only sue in respect

of what you had registered as a trade mark." This doctrine was approved of in many subsequent cases, to one of which I would only now refer, "*In re Lyndon's Trade Mark*" (L.R. 82, Ch. Div. 109). If this is a correct view of the law, and if it can be applied in our Courts—and I submit it can, because the registration of trade marks in this country, as in England, is regulated by statute—then the only question the Court has to determine is whether the label now sought to be registered by the applicants is an infringement of the respondent's trade mark as registered. Now to constitute an infringement you must either have an imitation or a colourable imitation calculated to deceive, or in the words of Lord Cranworth in the "*Leather Cloth Company v. American Leather Cloth Company*" (85 L.J., Ch. 58), the "resemblance must be such as to deceive a purchaser acting with ordinary caution." To enable the Court to arrive at a conclusion as to whether there has been an imitation or a resemblance calculated to deceive, it will be necessary for the Court to examine the two labels as registered. With the exception of the words "*Lager Beer*" and "*Registered*" there is not the slightest similarity between the two labels. Applying then the rule of law enunciated by Sir G. Jessel, to which I referred in opening my argument, where is our infringement of the respondent's trade mark? It will be difficult to find it because it does not exist. If the respondent had registered the word "*Sun-brand*" on his original label, and if we had subsequently adopted the words "*Original Sun Brand*," in conjunction with a device resembling the respondent's device, the onus might then have been on us to show that we were not using a trade mark calculated to deceive purchasers who thought they were buying the respondent's beer. But these words were never registered, nor indeed do they appear to have occurred to the respondent until last year, when through his agents he had a number of tin plates manufactured bearing his label and having the word "*Sun-brand*" written across it. And this new label differing from the respondent's registered label in essential particulars was by his direction affixed to some sixty-eight of the principal railway stations in the Colony. Further than this the respondent's beer is as generally known, if not more generally known, by the name of Burg beer than by the name of Sun-brand beer, as appears from the affidavits sworn to by leading merchants in Port Elizabeth, and from advertisements inserted by the respondent's agents, so that the adoption of the words Sun Brand was a mere afterthought and did not, as I said before, occur to the respondent until last year. It may, however, be asked how we came to use the words "*Original Sun Brand*," words, which taken by themselves, and without explanation, would, I admit, appear suspicious. That question is

answered by Mr. Reiners in his affidavit, and is uncontradicted, namely, that for years his firm has used the trade mark "*Original Sun Brand*" in connection with other articles which they sell, viz., candles, chicory, &c., and it is merely that the firm may have uniformity in all the articles which they sell that they wish to register their trade mark. Counsel also referred to the following cases: "*In re Horsburg*" (58 L.J., Ch. 287); "*The Leather Cloth Company v. the American Leather Cloth Company*" (85 L.J. Ch. 58); and "*Blackwell v. Crabb*" (36 L.J. Ch. 504), and contended that the applicants were entitled to have their trade mark remain on the register, and that the order of the 12th April should stand.

Mr. Juta said: The applicants' label as now registered is not a trade mark within section 9 of Act 22 of 1877, or by section 1 of Act 27 of 1891. Generally on the case he referred to the following authorities: "*Johnston v. Orr Ewing*" (7 A.C. 219); "*Singer Machine Company v. Wilson*" (8, A.C. 876); "*Seixo v. Provezende*" (1, Ch. 192); "*Cocks v. Chandler*" (11 Eq. 446); "*Mitchell v. Henry*" (15 Ch. Div., 181); "*Montgomery v. Thompson*" (A.C. 1891, 217); "*In re Australian Wine Importers*" (41 Ch. Div., 278); "*In re Hanson's Trade Mark*" (87 Ch. Div., 112); "*In re Barker's Mark*" (58 L.J., 23); "*In re Jackson's Mark*" (60 L.J., 98); "*Eno v. Dunn*" (15 App. Cas., 252).

Mr. Sheil in reply: The applicants' trade-mark was registered in its present form by order of Court.

If it is not a trade-mark the respondent has his remedy under section 5 of the Act, but that question is not now before the Court.

No argument has been addressed in answer to the applicants' contention.

The cases cited might apply if the respondent's beer had been known only as "*Sun-brand Lager Beer*" but it is known just as generally as "*Burg Beer*."

The Chief Justice said: I must confess that I was greatly influenced, in making the previous order in this case, by the absence of any physical similarity between the applicants' label and the trade mark of the respondent. I repeat what I then said: That whether the two labels are placed side by side or looked at separately there is not such a physical resemblance as would be likely to deceive anyone. The respondent's label contained the device of a bright orb, and the applicants' label contained the words "*Original Sun Brand*," but beyond this resemblance there was nothing which could lead a customer to mistake the one for the other. It now appears, from the certificate of the Registrar, that the respondent's prior application for registration had specified the representation of the "*Sun*" as a distinctive device of his

trade mark. It is clear, therefore, that the figure of the sun appearing on the respondent's label can no longer be treated as a meaningless device which might be taken to represent any bright orb. The sun only was intended to be represented and the question arises whether another label bearing the words "original sun brand" ought to be allowed to be registered. At the previous hearing the concluding passage of the 6th section of Act 22 of 1877 was mainly relied upon in opposition to the application for the registration of the applicants' trade mark. The passage is as follows: "It shall not be lawful to register as part of or in combination with a trade mark any words, the exclusive use of which would not, by reason of their being calculated to deceive or otherwise, be deemed entitled to protection in a Court of Equity in England, or any scandalous design." Now, the 78rd section of the English Act is in the same terms, except that the words would . . . be deemed disentitled" are substituted for "would not . . . be deemed entitled." Upon this section it has been decided by Jessel, M.R., in *Horsburgh's case* (58 L.J., Ch. 288) that it refers to deceptiveness inherent in the mark itself, and not to liability to be mistaken for another mark. But the question still remains whether the preceding portion of the 6th section of our Act applies to the present case. The Registrar is there directed not to "register with respect to the same goods or classes of goods a trade mark so nearly resembling a trade mark already on the register with respect to such goods or classes of goods as to be calculated to deceive." At the previous hearing too much stress was laid upon the absence of any physical resemblance between the two labels and upon the evidence of actual user by the respondent of the term "Sun Brand" in the course of his trade. The respondent had, according to the entry now produced from the Deeds office, actually registered the sun as his device. A label, therefore, which contains the words "original sun brand," although differing altogether in its general appearance from the respondent's label, resembles it in this important respect that it in terms adopts the same device. This resemblance, although not intended to deceive, is certainly "calculated to deceive." The use of the adjective "Original" increases rather than diminishes the probability of deception. In the United States Act the registration of a trade mark is prohibited which "so nearly resembles another registered trade mark as to be likely to deceive the public." Under this section the Court in *In re American Lubricating Oil Company* (9 U.S. Pat. Gaz., 687), refused registration to the word "Star" as a trade mark on oil, the device of a star having already been registered for the same article. I have come to the conclusion therefore that the order directing the Registrar of Deeds to register

the applicants' trade mark ought to be revoked. The applicants had no intention to deceive. They merely proposed to apply to their imported beer a designation which they had already successfully applied to other goods imported by them. Unfortunately however, in regard to beer, the respondent had already registered the device of the "Sun" before the applicants applied. Customers who have been in the habit of buying beer with that device might easily be deceived by a label describing the applicants' beer as the "Original Sun Brand." The case for the applicants has been very ably argued, but after careful consideration, I have come to the conclusion that the order directing the Registrar to register the applicants' trade mark must be rescinded. We cannot, of course, alter the judgment as between the parties in regard to cost, but the costs of the present application must be borne by the applicants.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinne; Respondent's Attorneys, Messrs. Scanlen & Syfret.]

Re CAPE OF GOOD HOPE BANK.

Mr. Schreiner moved for leave to the original liquidators to issue a writ of execution against Francis Gerhard Myburgh for the call of £30 each on two shares in the said bank registered in his name.

The order was granted.

SPOLANDER V. SPOLANDER.

Mr. Oastens moved for a rule nisi requiring petitioner's wife to show cause why he should not be admitted to sue her in *forma pauperis* in an action for restitution of conjugal rights.

The order was granted, the rule to be returnable on the first day of next term.

IN THE ESTATE OF THE LATE JOSEPH WALKER.

Will—Attestation—Ordinance 15 of 1845

Section 3—Non-compliance with terms of section.

Mr. Graham moved for authority to the Master to issue letters of administration in the said estate to the widow Margaret Agnes Walker, executrix testamentary thereof. The Master had refused to issue letters of administration, as the will had been written on the inner leaves of a sheet of note paper, but had only been signed on one leaf by the testator and the witnesses. Consequently the provisions of Ordinance No. 15 of 1845, section 8, had not been complied with.

Mr. Graham contended that the will had been written on one leaf only, and that the provisions of the Ordinance had been complied with. He cited "Walker v. Walker" (Buch. 1874, p. 144); "*In re Edden's Will*" (4 Juta 495); and "*Van Vuren v. Van Vuren*" (2 Searle, 116).

The Chief Justice said that the only question in this case was whether the instrument tendered was written upon more leaves than one; if it was written on more leaves than one, then it had not been properly signed and attested as required by the Ordinance. Care must be taken in cases of this kind not to give a decision which might affect other cases. If the will had been written on foolscap paper he had no doubt whatever but that it would have been written on two leaves, and the fact that it was written on note paper should not affect the judgment of the Court. Instead of writing continuously across both pages, the testator wrote pagewise, and therefore in his (the Chief Justice's) opinion, wrote on two leaves instead of on one, as had been contended. The testator had not complied with the provisions of the law. He regretted that he could not see his way to assist the applicant in this matter. If any alteration in the law was required, the Legislature must make the amendment, and not the Court. The application must therefore be refused.

Re ABRAHAM DE SMIDT.

Mr. Graham moved for an order authorising the detention of the alleged lunatic at some properly-regulated asylum, and for authority to the Master to pay out a share of inheritance of the alleged lunatic in satisfaction of the costs of the proceedings, and any balance to be applied towards his maintenance.

The order was granted, Mr. E. R. Syfret being appointed *curator bonis*.

Re ESTATE OF THE LATE FRANCISCUS H. BOONZAAR.

Mr. Schreiner moved for an order authorising an addition to the order of the 18th April, 1892, of a declaration that the above-named estate as it stands be taken to be the joint estate of the said Boonzaar and his predeceased spouse, and that the costs of the application be paid out of such estate.

The order was granted.

Re ESTATE LATE GEORGE OSBURN.

Mr. Sheil moved for authority to the executor of the said estate to pass transfer of a certain piece of ground known as the Hermitage, situated

at Mowbray, the property of the estate, but erroneously registered as belonging to George Horsborn.

The order was granted.

Ex parte CROEZER.

Mr. Juta moved for an order amending the antenuptial contract executed by Croezer and his wife by substituting the latter's correct name, Katherina Hendrika Spangenberg, for Katherina Henrietta Spangenberg, erroneously inserted in the contract.

The order was granted.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] { 1st Aug,* 1892.

PROVISIONAL ROLL.

VAN NOORDEN V. KLOSSER AND KLOSSER.

Mr. Sheil moved for provisional sentence upon a promissory note for £600, with interest from the 15th July, 1892. The note being made by first defendant, and signed as surety and co-principal debtor by the second.

Provisional sentence granted.

COPELAND'S LIQUIDATORS V. COLEMAN.

Mr. Graham moved for provisional sentence upon a mortgage bond for £150, with interest from 15th July, 1892. The defendant was sued by edictal citation. He could not be found, so the citation was published. Instead of a formal citation, an ordinary form of summons, addressed to the Sheriff of this colony, was used. The defendant was last heard of in the Free State. Full publicity had been given.

The Chief Justice said that as it appeared that the object of the citation had been attained, the order would be granted, but in future the proper form should be observed.

BEITZ V. JACKSON.

Mr. Tredgold moved for provisional sentence on

* I have to express my indebtedness to Mr. Advocate Tredgold for his valuable assistance in reporting the cases decided in the August Term.—Ed.

a mortgage bond for £75, with interest from 18th December, 1890.

Granted, and property declared executable.

MYBURGH'S ASSIGNEES V. SCHREUDER.

Mr. Molteno moved for judgment under Rule 829 for £60 9s. 1d., the balance of an account, less £10 already paid.—Granted.

**GIBSLING'S EXECUTORS V. GIBSON { 1892.
AND OTHERS. } 1st Aug.**

Conditions of sale—Land with buildings thereon—Sale according to transfer—Encroachment on Government property—Provisional sentence refused.

Mr. Schreiner moved for provisional sentence on two conditions of sale, one for £1,088, the other for £68, with interest from February, 1892, auctioneer's commission, and £1 1s. charges on the conditions.

Mr. Juta appeared for the defendants; the defence being that this was really an action for the purchase price of certain property, and that the plaintiffs had not tendered transfer of the property purchased. A sale had been advertised of certain property in Ghisling's estate at Sir Lowry Pass. In that it was stated an hotel, with accessory buildings of a mill and stable capable of holding sixty horses, would be sold. Dean, one of the defendants, attended the sale, and bid on behalf of Gibson. The property to be sold was stated to be 500 square roods, with buildings thereon. At the sale Bosman acted as auctioneer. Dean and others swore that it was asked whether all the buildings, stable, and mill were to be sold, and Bosman replied: "Certainly, we sell the right to the whole property." Dean then bid, and bought the property *q.q.* Gibson. He signed the conditions without reading them, and gave his name under the impression that the stables were sold. He was never told that the stables were not to be sold. The whole set of buildings were in one block. The conditions ran that the property was sold "as it now stands or is believed to stand." When the transfer was tendered, it appeared that the stables encroached to about two-thirds their entire length on Government land, and plaintiffs could not give transfer of it. Ghisling knew of this, and had made application to Government for a grant of this land, which they seem inclined to give. The whole cost of the land would be £100.

Mr. Schreiner, for the plaintiffs, contended, on the authority of "Van der Merwe v. Burgers" (4 Juta, 129), that the facts were no defence to provisional sentence.

The Court held that the cases were distinguishable, and he proceeded to read the affidavits of plaintiffs. Mr. Montgomery Walker, attorney for plaintiffs, stated that application had been made for this land, and the Government appeared ready to grant it. At the sale questions were put as to the stables, and one man asked if they did not encroach on Government land. Consultation was held, and it was decided to sell according to the transfer; no diagram was produced. It was not said that the whole block of buildings was sold. The advertisement was made up from various sources of information and from an old advertisement of the sale of the property. It was said at the sale that Government was ready to grant the land. In consequence of the sale being according to the transfer, the bidding was slow and dull. No objection was made, and Gibson asked Walker to try and help the grant through, which he did. No objection was taken until just before this case was to have come on, on July 12. The sale had been made from the stoep of the hotel. At first his impression was that all the buildings would be sold. The auctioneer refused to sell with any guarantee and decided to sell by the transfer deed alone. He sold only plaintiffs' right to the buildings. The boundary between plaintiffs and Government land ran right through the stable.

Mr. Juta contended that under the conditions of sale the defendants bought 500 square roods with buildings. They must tender the whole. Either the executors intended to transfer Government ground, or there was a deliberate misstatement in the advertisement. It is admitted there was a general impression that all the buildings would be sold. The defendants never knew the stables were on Government ground.

Mr. Schreiner submitted that they need give no more than the actual land sold with buildings on it. No bid was made until after the conference. The sale was then according to the transfer. Mr. Walker did not know how far the encroachment went, though he did know of the encroachment.

The Chief Justice, in giving judgment, said according to the affidavits of the plaintiffs there was a sale by public auction, which sale was to be according to the deed of transfer, but, unfortunately for the plaintiffs, the conditions of sale were entirely silent as to the deed of transfer. In terms of the conditions, the plaintiffs sold certain land, in extent 500 square roods, with buildings thereon, and among those buildings were certain stables. If the stables were standing on land advertised to be sold, it might clearly be presumed that they were included. In this case it appeared that more than half of the stable buildings was standing on Government ground. The plaintiffs now tendered the land minus two-thirds of the said buildings, and naturally the defendants

declined to accept those conditions. There seemed to him sufficient ground for refusing provisional sentence. There were certain facts in dispute which could be more clearly explained if the parties went into the principal case. There was one allegation that the agent of the sale knew that the greater portion of the stables stood on Government land, and there was no explanation why this fact was not brought to the notice of the bidders at the sale. They attended in consequence of the advertisement, and would be buying under the belief that the whole of the buildings were on land entitled to be sold. Possibly some explanation might be given if the parties went into the principal case; but he hoped they would not do so. Perhaps one or the other of the parties would buy the land from the Government, and then there would be no further litigation. Provisional sentence would be given for £68, the question of costs to abide the result if the parties went into the principal case.

[Plaintiff's Attorney, G. Montgomery Walker; Defendants' Attorneys, Messrs. Fairbridge & Arderne.]

GOLDINGER'S EXECUTORS V. FRIEDLANDER BROTHERS.

Mr. Schreiner moved for judgment against the defendants in default of their plea.

Mr. Juta opposed on the question of costs only. This matter came up on the 12th July last, when defendants offered to plead so as to allow plaintiffs to go to trial this term. It was contended that the proceedings of July 12 were premature in the face of certain correspondence which had passed between the parties.

The Chief Justice said he saw no reason why the defendants should not pay all costs. The only ground on which they might escape was a tacit promise to go to trial to-day, and this they had not complied with. They must pay the costs of the proceedings on the 12th and of to-day.

THOMAS V. THOMAS.—ACTION FOR RESTITUTION OF CONJUGAL RIGHTS.

Mr. McLachlan for plaintiff; defendant in default.

Mr. Norman Lacey proved the marriage.

Mrs. Thomas stated that she was married on 22nd March, in Cape Town. She lived with her husband, but he never supported her. She wrote to him asking for help, and he replied that she must not ask him for money. There were no children.

By the Court: He was an artilleryman, and they had married without leave. He left with his battery, and could not take her with him. She

believed he could have taken her if he wished. She believed he had left the army.

The Court granted a decree of restitution of conjugal rights, the defendant to return to or receive his wife on 31st October, or show cause on 20th November, 1892, why a decree of divorce should not be granted.

DAWSON V. DAWSON.

Mr. Sheil for plaintiff; defendant in default.

This was an action for restitution of conjugal rights, failing which for divorce, by reason of the defendant's malicious desertion.

Mr. Norman Lacey gave formal evidence in proof of the marriage.

Mr. A. S. Dawson stated that he was married in Cape Town in August, 1887. He made certain settlements on his wife. He lived with his wife for three years when she left him and went to England. She wrote to him saying she could not live with him any more. He went to England and saw her, then went to Australia; he returned to England, and then came out here and instituted these proceedings. He urged her by letter to return to him, but she would not. He was living here now, but would probably return to England. He was undecided. Her father would send her back if she would come; he had already sent her about £300.

The Chief Justice intimated he would like the point argued as to whether, by a decree of divorce for malicious desertion, the deserting party should suffer forfeiture of any benefits under an antenuptial contract. This point would have to be argued before the rule *nisi* was made absolute. Defendant was called upon to return by 31st October, 1892, or to show cause on 20th November why a decree of divorce should not be granted.

Ex parte BURTON.

Mr. Graham moved for the admission of Mr. Henry Burton as an advocate.

The admission was ordered, the oaths to be taken before the Registrar of High Court, Kimberley.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: Michael Henry Daly and Jacobus Arnoldus Mostert.

GENERAL MOTIONS.

In re THE SOUTH AFRICAN MUTUAL BENEFIT SOCIETY.

Mr. Sheil moved to make absolute the

rule nisi for the issue to petitioners of a certified copy of certain mortgage bond for £850, passed on the 28rd February, 1884, in favour of the trustees of the said society, by the Dutch Congregational Church of Port Elizabeth, hypothecating a lot of ground, No. 28, with the building thereon, at North End, Port Elizabeth.

The order was granted.

RICHARDS V. RICHARDS.

Mr. Tredgold moved to make absolute the rule nisi for dissolution of the marriage subsisting between the parties, by reason of respondent's failure to obey the order for restitution of conjugal rights to his wife, and for the division of the community of property.

The Court granted the order, but intimated that the attorney should not make a general statement, but should state what steps had been taken to effect service, and it was not for him to say what were reasonable grounds, but for the Court.

In re THE PETITION OF G. C. BAYNE, IN HIS CAPACITY AS THE CHAIRMAN OF THE DIVISIONAL COUNCIL OF PORT ELIZABETH. 1892. 1st Aug.

Costs—Sale of derelict land—Act 28 of 1881, Section 20—High Sheriff's allocation of costs confirmed by Court.

Mr. Sheil moved for an amendment of the Sheriff's plan of distribution of the proceeds of the sale of five lots of derelict land, by awarding to applicants the full amount of their taxed costs out of the total sum realised, instead of apportioning one-fifth of such costs as a charge against the proceeds of each lot.

This motion raised a question of considerable importance to Divisional Councils, Municipalities, and other public bodies seeking to obtain relief under the Titles Registration and Derelict Lands Act, 1881.

The facts are as follows: Certain lots of ground, five in number, situate at Walmer in the division of Port Elizabeth, were lately, by direction of the Supreme Court, attached and sold in terms of the Act for the recovery of sundry rates due and unpaid.

Costs amounting to £56 10s. 7d. were incurred by the Divisional Council in searches, judicial copies of deeds, and survey work necessary for the attachment and sale by the High Sheriff.

Of the five portions of ground sold, four contained one lot each and one contained three lots. The High Sheriff, in framing his scheme of distribution, debited each of the five portions of

ground with one-fifth of the total costs, the result being that there was an insufficiency of proceeds in the case of four of the said portions of ground to pay the Divisional Council's costs, amounting to £20 4s. 8d.

The piece of ground containing three lots, and registered in the name of one Harding Ford, realised at the sale £72, and after deducting the amount of the rates and one-fifth of the costs and other expenses, the High Sheriff proposed to pay the balance, amounting to £58 10s. 2d., into the Guardians' Fund, in terms of section 20 of the Act.

The Divisional Council objected to the action of the High Sheriff, and prayed the Court, when considering his report and scheme of distribution, to be pleased to amend the same by allowing them the full amount of their taxed costs out of the total proceeds of the sale.

Mr. Sheil said: We contend that the taxed costs should be paid in full out of the total proceeds of the sale irrespective of what each portion realised, as the costs were incurred in rendering all these lots executable as a whole.

If any other distribution of costs is adopted the Divisional Council and the ratepayers of Port Elizabeth will fail to obtain that relief which it was clearly the intention of the Legislature to confer by section 4 of the Act.

If the allocation of costs suggested by the High Sheriff is approved of by the Court, the Divisional Council in attaching the land and recovering rates amounting to £9 8s. 10d. actually lose more than double that amount, viz: £20 4s. 8d.; surely this result could never have been contemplated by the Act.

If the contention of the High Sheriff is maintained, Divisional Councils, Municipalities, and other public bodies will hesitate before taking proceedings under the Act when by doing so they run the risk of losing the necessary expenses which they have incurred in seeking relief.

The High Sheriff appears to have proceeded upon the assumption that each of these lots was separately attached, but this was not so, they were attached as a whole, and the High Sheriff virtually acknowledges this by taking the lump sum of his fees and charges, viz: £16 14s. 8d., and then applying one fifth to each lot.

If the lots had been separately attached he would have known what expenses were incurred in attaching each and would have charged each lot with that amount; but he has not done so, he has simply taken one-fifth of his total charges and debited each lot with that sum—this is a clear acknowledgment that the lots were attached in bulk and not separately. Again, the expenses of the Divisional Council were incurred in tracing this land as a whole, although it was divided into lots for the purposes of transfer and attachment.

It is curious to observe what the result will be if the distribution of costs adopted by the High Sheriff should be held to be correct.

Five portions of land were attached, four of these containing one lot each, and one containing three lots. Now the proportionate cost of tracing and attaching this latter portion must have been greater than in the case of the other four portions, which only contain one lot each; there are virtually seven lots, and the one portion containing three lots is only debited with one-fifth of the charges instead of at least with three-sevenths.

Again, if we look at the rates due on all these properties and on each separately we shall find that on this portion containing three lots the rates amount to £8 16s. 7d. out of a total of £9 8s. 10d., or nearly four-ninths of the whole, and yet in respect of this land representing nearly four-ninths of all the rates due only one-fifth of the costs are apportioned; surely this is not an equitable distribution.

Further, if we look at the prices realised by the sale of this land we shall find that the portion containing three lots brought £72 out of a total of £116 or nearly two-thirds of the whole.

If then we distribute the costs according to the value of the lots, that is in proportion to the prices which they realised, it would be most inequitable to only debit a large piece of ground which brought nearly two-thirds of the total amount realised with only one-fifth of the expenses and treat it on the same footing as one of the lots which only brought £6.

With regard to the former practice there was either no loss or a loss so small as not to be worth troubling about.

This is clearly a case for the intervention of the Court or a serious injustice will be done, and the Divisional Council of Port Elizabeth will sustain a loss which the ratepayers will undoubtedly object to make good.

The Chief Justice, in delivering judgment, said: The owner of every lot could only be held liable for the costs incurred in selling that lot. If each owner had been sued separately, there would have been no difficulty. Again, if it could be shown in the present case that greater costs had been incurred in selling Harding Ford's lot, there could be no objection to an amendment of the distribution of costs, but there is no such allegation, and we are now asked to make the owner of that lot pay the costs of the other owners. This clearly cannot be done, and the application must be refused.

[Petitioner's Attorney, G. Montgomery-Walker.]

JAMES V. JAMES.

Mr. Molteno moved to make absolute the rule nisi for the dissolution of the marriage subsisting

between the parties, by reason of respondent's failure to obey the order for restitution of conjugal rights, and to give the custody of the child of the marriage to the mother.

The order was granted.

IN THE ESTATE OF THE LATE PHILIP PENNY.

Mr. Graham moved for authority to the beneficiaries under the will of the deceased to mortgage certain farm No. 78, in the district of East London, for the purpose of paying certain taxes thereon and providing applicants with the means of working the farm for their benefit.

The order was granted.

In re THE MINOR FOSSATI.

Mr. Graham moved for authority to the Master to pay out to the said minor his maternal inheritance to enable him to purchase the farm Rhenoster Kop, in the district of Albert, for the purpose of engaging in farming pursuits for his own benefit.

The order was granted.

In re PETITION OF WILLIAM F. ELLIOTT.

Mr. Juta moved for authority to petitioner to raise a sum of money, to be applied to the maintenance and education of his minor children, on security of certain life policy settled by antenuptial contract on petitioner's wife.

The order was granted, subject to the production to the Registrar of the written consent of the trustees.

MUSGROVE V. MUSGROVE.

Mr. Molteno moved on behalf of plaintiff for leave to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

The order was granted.

POWELL V. POWELL.

Mr. Sheil moved to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for a judicial separation, by reason of his drunkenness and misconduct.

The order was granted.

In re UNION BANK, IN LIQUIDATION.

Mr. Schreiner, Q.C., moved for the sanc-

tion of the Court to certain compromises proposed to be effected by the official liquidators with debtors and contributories.

The following are the compromises :

A. von Grossicks.—Debt, £899 4s. 10d.; offers £100, which amount has been deposited.

H. G. Myburgh offers for his liability on ten shares to assign all his remaining assets. The sum of £1,059 10s. 6d. has already been paid.

W. L. Kidney.—Debt, £228 9s. 4d.; offers £40 cash, and to surrender all securities held by the bank.

R. Mensies.—Debt, £1,741 4s. 11d.; offers £500 cash, which has been deposited.

J. P. Rossouw.—Debt, £148 19s. 8d.; offers a payment of £50, secured by endorsement of De Ville & Co., Paarl.

E. J. Joubert.—Debt, £150 1s.; offers 5s. in £, and to surrender all securities held by the bank.

H. B. Keytel & Son.—The representatives of this firm (now dissolved) propose to release the promissory notes, the subject of the debt, and amounting to £378 17s. 8d., by a cash payment of £25.

David J. Malan.—Debts, contributory on sixty-nine shares in bank, and on thirty-five shares in Paarl Bank; proposes to assign all his estate for the benefit of his creditors.

J. J. D. Malan.—Debts, contributory to bank in respect of twenty-seven shares, and on thirty shares in Paarl Bank; proposes to assign all his estate for the benefit of his creditors.

E. J. Karp.—A contributory on 800 shares in this bank (on which £751 2s. 11d. has been paid) and on twenty-two shares in the Cape of Good Hope Bank (Limited); offers a sum of £6,000, payable within thirty days of acceptance of his offer, such sum to be divided between *pro rata* the two banks interested.

R. M. Maxwell.—A contributory on 295 shares in this bank; has already paid in £754 8s. 8d., and now offers the sum of £2,671 for his liability, payable as in the case of E. J. Karp.

Miss Helen Maxwell.—A contributory to this bank on fourteen shares; offers the sum of £1,860, payable as in the case of E. J. Karp.

The Estate of the Late J. E. Maxwell.—A contributory on 282 shares in this bank (on which £619 8s. 11d. has already been paid), and thirty shares in the Cape of Good Hope Bank (Limited); offers the sum of £17,400, payable in sums of not less than £850 per month, with interest at 5 per cent. per annum, such payments to be divided *pro rata* between the banks interested.

Mrs. Susan Maxwell.—A contributory to this bank on fifty-three shares (whose assets are merged in the firm of Maxwell & Karp); has already paid £1,487 11s. 8d. on account of calls, and proposes to liquidate the

balance and interest by monthly payments of £850, such payments to commence after payment of the proposed compromise with the estate of the late J. E. Maxwell.

The Court sanctioned the compromises. The compromises of Maxwell & Karp to be sanctioned conditionally; their compromise to be paid in full within thirty days from the present date.

IN re CAPE OF GOOD HOPE BANK, IN LIQUIDATION.

Mr. Schreiner, Q.C., moved for the sanction of the Court to certain compromises proposed to be effected by the official liquidators with debtors and contributories of the bank. The following are the compromises :

H. S. Caldecott, Johannesburg.—Debt, £42,608 17s. 1d.; offers bond for £1,000 passed by Mrs. M. J. Caldecott, in favour of the official liquidators, over her house at Johannesburg; also all securities in the bank's possession, valued at £10,805 17s. 6d.

E. J. Karp, Cape Town.—Debt, £860; offers £6,000, to be paid within thirty days after the sanction of the Supreme Court to this compromise, which amount is to be divided *pro rata* between the Union Bank and this bank.

J. H. F. Fiek, Pretoria.—Debt, £790 7s. 11d.; offers £50 cash, paid, and all securities in the bank's possession.

Estate J. E. Maxwell.—Debt, £900; offers £17,400 in monthly instalments of £850 each, with interest at 5 per cent., to be divided *pro rata* between the Union Bank and this bank; this bank to receive its share within three months after the Supreme Court has sanctioned this compromise.

H. J. Watts, Durban, Natal.—Debt, £420; offers 10s. in £, of which £128 6s. 8d. is paid; release conditional on due payment of the balance, £31 18s. 4d.

The consideration of the first compromise was postponed until 11th August. The other four were sanctioned by the Court.

REGINA V. PEARSON. { 1892.
1st Aug.

Liquor Licensing Act, 1883—Bottle Licence.

A sale is not in bottles in terms of the 7th section of Act 28 of 1883 unless the liquor was in the bottle at the time of the sale and was delivered to the purchaser in such bottle.

The appellant, holder of a bottle licence, supplied a customer by measuring brandy in a bottle and pouring the contents into a tin "canteen" of the customer who then paid for the brandy.

Held, that the appellant was properly convicted of a contravention of the 3rd sub-section of the 7th section of the Act.

This was an appeal from a conviction by the Resident Magistrate of Prieska of the appellant for contravening sub-section 8, section 7, of Act 28 of 1888, by selling brandy in a vessel other than a bottle; to wit, a tin can. The evidence showed that a man came to the bottle-store of appellant and asked for a bottle of brandy. Pearson took a bottle, filled it from a cask, and emptied it again into a tin "canteen," the man paying 2s. The section of the Act is: "A bottle licence" shall authorise the "sale on the premises . . . of liquors in bottles not to be consumed on the premises."

Mr. Molteno, on behalf of the appellant, contended that the evidence showed it was a sale in a bottle. The appellant sold the brandy in a bottle only, the canteen was not his. The Act of 1891 apparently recognised such selling as legal. Again, the "canteen" itself was a "bottle" for the purposes of the Act.

Mr. Giddy for the Crown was not heard.

The Chief Justice, in delivering judgment, said: Under sub-section 8 of the 7th section of Act 28 of 1888 a bottle licence authorises the sale of liquor in bottles and not to be consumed upon the premises. The appellant being the holder of such a licence sold some brandy in the following manner: The brandy was measured in a bottle and poured into a tin "canteen" of the purchaser, who then paid two shillings for it. Was this brandy sold in a bottle? The sale took place with the delivery of the brandy into the purchaser's possession, that is, pouring it into his "canteen." The bottle was merely used as a measure and after being so used was retained by the seller. In my opinion no sale of liquor can be held to be "in bottles" unless the liquor was in the bottle at the time of the sale and was delivered in the bottle to the purchaser. There has been an attempt to evade the law, and the appeal must be dismissed.

Mr. Justice Buchanan and Mr. Justice Upington concurred.

[Appellant's Attorney, G. Montgomery-Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] 1892. 2nd Aug.

KOTZE V. OHLSSON'S CAPE BREWERIES.

Employer—Contractor—Negligence.

The defendant having been required by the Town Council to connect his house drain with a public sewer employed a competent contractor for the purpose. The contractor did the work under the supervision and to the satisfaction of the City Engineer.

The plaintiff having been injured by reason of a horse driven by him putting its foot into a hole caused by the improper filling up of the excavation, sued the defendant for damages.

Held, that inasmuch as the municipal regulations required that the work should be done under the supervision and to the satisfaction of the City Engineer, the defendant, who employed a competent contractor to do the work in accordance with such regulations, was not liable for damages.

This case came on appeal from a decision of the Resident Magistrate of Cape Town. The plaintiff (the present appellant) had sued the defendants for £20 damages, said to have been caused by an accident due to the alleged negligence of the defendants. Kotzé was driving along Waterkant-street on Whit Monday when the horse put its foot into a hole and fell. Kotzé and a companion were thrown from the cart, and the former sustained injuries. This accident happened between the two lines of tram rails, where a hole was found which had caused the fall. It appeared that in March, 1892, Ohlsson's Cape Breweries Company had engaged Lee, a contractor, to connect their premises at Nos. 10 and 12, Waterkant-street, with the main sewer by a drain. Leave was granted to Lee, the contractor, to do his work and make the necessary excavations in the street. The permission was granted to Lee as contractor for Ohlsson & Co. The notice granting permission contained the following clause: "The street to be properly repaired on completion, and all risk, liability, and responsibility to be undertaken by applicant. . . . No work is to be covered over until inspected by the City Engineer or Clerk of the Works." Lee had tunnelled a short way under the tram line, and it was contended that this not

being properly stamped or peaked, had subsided and caused the accident. Plaintiff sued the defendants for damages, and the Magistrate found that the work had been done by the contractor, who employed his own men, acting free from defendants' control; that the accident was caused by not filling the hole properly; that the contractor had been negligent, and dismissed the case. The plaintiff appealed.

Mr. Graham appeared for the appellant, and contended that the general rule was that if a person employed an independent contractor he was not liable for his acts. There were two exceptions: (1) If the work would almost necessarily cause injury to a neighbour; (2) if the work was imposed on the employer by statute or common law. It was defendants' duty to make the drain here, they were called upon by the Town Council. The accident was caused by improper tunnelling. There was a clear legal obligation to do the work properly. He quoted: "Dicey, Parties to an Action" (1870, p. 45, 8); "Underhill on Torts" (3rd Ed., p. 51); "Gray v. Pullen" (5 B. and S., 970); "Picard v. Smith" (10 C.B.N.S., 470); "Kimberley Town Council v. Von Beek" (1 App., 101); "Bower v. Peate" (1 Q.B.D., 821).

Mr. Juta, for the respondents, urged that they were not liable; they had no control over the contractor. The Town Council had complete control of the workings. (See section 287 of their regulations.) The whole work was done at the instance and to the satisfaction of the City Engineer. Even if Ohlssons had done it themselves they would be under the control of the City Engineer. The work was passed by the Town Council. The Town Council inspected, and the work was to their satisfaction.

Mr. Graham in reply.

The Chief Justice, in delivering judgment, said: Several interesting questions have been raised during the argument as to the extent of the liability of a person for damages caused by the acts of a contractor employed by him. The cases cited were chiefly English cases, and in none of them was the exact question raised which now arises for decision. The defendant company was required by the Town Council of Cape Town to construct a drain from their premises to the main sewer. For that purpose the Company employed a contractor. The 267th Municipal regulation provides that "no public sewer shall be laid open, nor pavement of a street broken up, without the written sanction of an officer of the Town Council. When a communication has to be made between a house drain and a public sewer the works shall only be carried out under the supervision and to the satisfaction of the City Engineer." Under this regulation the contractor broke up a portion of the pavement, connected the house drain with the

main sewer, and then filled up the excavations in the pavement. All this was done under the supervision and to the satisfaction of the City Engineer. Sometime afterwards the plaintiff's horse, while being driven by him in the street, put its feet into a hole and fell, causing injury to the plaintiff. This hole is alleged to have been caused by the improper work on the part of the contractor, and the plaintiff's contention is that the defendants are liable for damages caused by the negligence of their contractor. I am of opinion that under the circumstances of the present case no such liability attaches to the defendant company. It was required by the Municipality to do a certain work and the work was done to the satisfaction of the Municipal Engineer in accordance with the Municipal regulations. A competent contractor was employed who worked under the supervision of the City Engineer. I fail to see what more the company could reasonably have been required to do. The proper party to be sued is the Town Council, whose duty it is to keep these streets in repair, and under the supervision of whose engineer the work was done. The Magistrate in my opinion was right in giving judgment for the defendants, and the appeal must therefore be dismissed with costs.

Mr. Justice Buchanan and Mr. Justice Upington concurred.

[Attorney for the Appellant, J. Hamilton-Walker; Attorneys for the Defendant Company, Messrs. Fairbridge & Arderne.]

STAMFORD AND ENGLISH V. GALE { 1892.
2nd Aug.

Costs—Tender—Judgment for amount of tender—Plaintiff to pay costs—Resident Magistrate's decision affirmed on appeal.

Mr. Graham appeared for the appellants; there was no appearance for the respondent.

This was an appeal from a judgment of the Resident Magistrate of Cape Town in an action in which the appellants (plaintiffs in the Court below) sued the respondent for the sum of £8, alleged to be due for work and labour performed and materials found and provided by the plaintiffs, at the special instance and request of the defendant, the work in question being the taking down, washing, painting, retaping, and refixing several sets of venetian blinds. The defendant objected to the price charged, and pleaded a tender of £5 without prejudice before summons, and also the general issue. The Magistrate gave judgment for the plaintiffs for £8, but ordered them to pay the costs. From this judgment the plaintiffs now appealed,

The following were the Magistrate's reasons for his judgment: Holloway (one of the witnesses) says that £8 10s. would be a fair price, and Oppel (another witness) says that £8 is the highest price anyone could charge for the blinds. There are two other items in the account, namely, 10s. for lead put on a step and 5s. for putting leads round doors. This makes altogether £8 15s. Deducting the 12 paid on account leaves a balance of £6 15s. From this must be deducted a sum sufficient to put the blinds in order, for it is admitted that they are not properly finished. The plaintiffs undertook a work which they clearly did not understand, and both Holloway and Oppel said that something must be spent on the blinds to put them in proper working order. Holloway said this would cost about a sovereign, and Oppel thought about 10s. This brought the amount very near the tender, namely £6 15s. or £6. It seemed to me on the whole that as the plaintiffs did their work so badly, and as there is an uncertainty as to the exact sum it would cost to put the blinds in perfect working order the amount tendered was all the plaintiffs were entitled to.

Mr. Graham was heard in support of the appeal, and contended that the plea of tender and at the same time the general issue amounted to a denial of the whole debt. He referred to "Monter v. Fuller" (Buch. 1875, p. 28) and "McDonald v. Bramson" (Buch. 1875, p. 40). Generally on the case counsel urged that as the Magistrate had virtually found that more than the amount tendered was due to the plaintiffs, the judgment should have carried costs.

The Chief Justice, in delivering the judgment of the Court, said: The Magistrate in this case has on the whole taken a reasonable view. He makes a calculation and finds that £5 odd is due to the plaintiffs. But they did their work badly, and for this the plaintiffs must suffer. There is some uncertainty as to what it would cost to put the work in a proper condition, and the defendants should have the benefit of this. It had been merely a matter of strict account we would have reversed the Magistrate's judgment. It is very evident, however, that the work was scamped, and substantial justice has been done by the judgment. The appeal must be dismissed with costs.

[Appellants' Attorney, J. Hamilton-Walker]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. 4th Aug.
Justice UPINGTON, K.C.M.G.]

PROVISIONAL CASES.

PAARL BERG WINE AND BRANDY COMPANY V. DU TOIT.

Mr. Watermeyer moved for provisional sentence upon a promissory note for £18, with interest from 1st February, 1892.—Granted.

KAUFMANN V. SCHUSTER.

Mr. Graham appeared for plaintiff and Mr. Tredgold as *curator ad litem* for the defendant. This was an action to have Mrs. Maria J. Schuster declared of unsound mind, and incapable of managing her person and property.

Mr. John H. T. B. Schuster stated that he was the eldest son of Mrs. Schuster, who was a widow and had eight children, six of whom were majors. One of the children was married to Mr. Kaufmann, plaintiff in the present action, which was brought with the consent and approval of the majors. Under his father's will his mother was to manage the estate. About two years ago she displayed symptoms of weakness of mind. She was now quite incapable of managing her own affairs, and he considered his brother-in-law, Mr. Kaufmann, a fit and proper person to manage the business. There was no intention of confining his mother in an asylum, as she was quite harmless.

Drs. Thomas and Scholtz gave formal evidence as to the state of defendant's mind.

Mr. Tredgold informed the Court that he had interviewed the alleged lunatic and found her condition such as had been stated by the medical witnesses. As minors were interested, he suggested that an independent person be appointed curator and not Mr. Kaufmann.

The Chief Justice said that it appeared to be the wish of the relatives that Mr. Kaufmann should be appointed curator, and as no reason had been shown to the contrary the Court would appoint him, the usual security to be found.

The Court then declared the defendant of unsound mind and incapable of managing her person and property.

The costs to come out of the estate.

ADMISSIONS.

Hubertus Elffers, as a sworn translator; Mr. Graham moved.

E. F. B. Schierhout, as a sworn translator; Mr. Graham moved.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE PIETER N.
HATTINGH.

Will—Specific bequests—Landed property—
Legatees—Leave to repudiate—No order
made by Court.

Mr. Graham moved for an order authorising certain legatees to repudiate the specific bequest of landed property in the said estate, and the allowing his executors to liquidate and administer the said estate without regard to such provisions of the will as are affected by the repudiation. The petitioners were executors dative and certain heirs and legatees under the mutual will of P. W. Hattingh and his wife. Under the will certain farms were left to the petitioners in shares, or to their spouses in event of their death, or to their children on the death of both. After the death of the survivor of the testators, the legatees were to pay into the joint estate £1 per morgen for their shares. The testators disposed of the residue of their estate among the survivor and their children. There were eleven children, seven of them being the petitioners. The testators have both died. The petitioners are heirs, with the other children, to the intestate estate of their mother. The petitioners have occupied this land bequeathed for some time, and have improved it under the belief it belonged to them absolutely, and the money had not been paid into the estate. The land is not worth £1 per morgen to them, and they wish to repudiate the inheritance. Some of the petitioners have minor children, and therefore the sanction of the Court is asked for the executors to liquidate the estate, without regard to such of the provisions of the will as are so repudiated. The question was, if such repudiation was allowed, what became of the interests of the grandchildren.

The Chief Justice said that the Court would make no order in this matter. It appeared that the executors had come to court merely to get an opinion, and were simply trying to turn the Court into legal advisers. They must act on their own responsibility, after taking the best legal advice they could get.

ROSENTHAL V. BARNARD.

On the motion of Mr. Schreiner, Q.C., who appeared for the defendant, plaintiff consenting, this cause was removed for trial to the next Circuit Court at Aliwal North.

WENTZEL V. BRINK'S EXECUTORS. { 1892.
4th, 11th, &
80th Aug.

Will — Construction — Children — Distribution.

A testator by his will appointed the children of his two brothers as his heirs, with the condition that such brothers and their spouses should during their lifetime receive the interest on the residue of his estate.

After the testator's death and during the lifetime of both brothers, four children of the one brother applied for leave to receive their share of inheritance, their father being willing to renounce his life interest pro rata in their favour.

Held, that the testator did not intend to confine the succession to children born before his death, that, inasmuch as the applicants' father was alive and might have more children, the shares of the applicants were not yet ascertainable, and that therefore the application could not be acceded to.

Mr. Schreiner, Q.C., appeared for the petitioners, and Mr. Graham for the respondents (The Board of Executors, Cape Town, and Stephen Brink Wentzel).

Mr. Schreiner moved for authority to the executors of the estate of the late Maria C. Brink to pay out to petitioners the amount devolving upon them as heirs in the said estate, the beneficiaries to the extent of the life interest therein having waived their rights.

It appeared from the petition that the petitioners are the sons of Willem Adriaan Wentzel, senior, and are all majors.

That the late Maria Catharina Brink (born Wentzel), who died on the 22nd February last, was the sister of petitioners' father, Willem Adriaan Wentzel.

That the said late M. C. Brink (born Wentzel) by her last will, which has been filed with the Master of the Supreme Court, appointed as heirs of her estate the children of her brothers W. A. Wentzel and S. B. Wentzel, giving to each of her said brothers and their respective spouses a life interest in half of her estate.

That petitioners' father, the said W. A. Wentzel, had at the death of the said Maria Catharina Brink, the time of the vesting of petitioners' inheritances, and still has, six children living, viz., petitioners and Maria T. F. Wentzel and Alfred Hubert Wentzel, a minor.

That Stephen Brink Wentzel, the brother of petitioners' father, had at the death of the late Maria O. Brink, and still has, two children living.

That therefore the heirs of the estate of the late Maria O. Brink are eight in number, and that therefore each of the petitioners is entitled to one-eighth of the residue of her estate, which residue appears from the liquidation account filed by the executor of her estate to be the sum of £2,567 14s. 6d.

That the petitioners are starting in life on their own account, and that it will materially aid them in their businesses if the inheritances be paid to them now.

That petitioners' parents have agreed to waive their life interest in the half of the estate of the late Maria O. Brink, and have consented to the petitioners receiving their inheritances forthwith, leaving the shares of the petitioners' sister and of their minor brother in the hands of the Master, to make up, together with the shares of of his two children, the half of the estate of the late M. O. Brink, in which Stephen Brink Wentzel has a life interest.

Wherefore the petitioners prayed that it might please the Court to grant an order authorising the executors to pay them the amount of the inheritances accruing to them out of the estate of the late Maria O. Brink.

The clause of the will referred to in the petition was as follows: "And now proceeding to the election of heirs, I hereby declare to appoint and to nominate, as my sole and universal heirs, the joint children of both my brothers, Willem Adriaan Wentzel and Stephanus Brink Wentzel, in equal portions, as also their descendants by representation (*"staakgewyse"*), with this condition: that both my brothers and their present spouses shall, during their lifetime, be entitled to receive the interest on the residue of my estate in such manner that each of my brothers aforementioned, or his surviving widow, receive the half of such interest each, and under this further limitation, that the interest shall never be used for other purposes than is here intended, and should it come to happen that by means of law, insolvency, or otherwise burden be laid on the interest, then and in such case I revoke hereby the institution of my said brothers and their spouses as heirs of the annual interest, and in their stead I appoint as heirs of that interest during their lifetime, and no longer, the executors named in this my testament; convinced and with full confidence that they shall take

the interest to carry out my desire herein. As executors of this my testament, administrators of my estate and effects, and also guardian over my minor surviving heirs, I appoint hereby the Board of Executors in Cape Town, with all such power as appertains to them. . . ."

Mr. Graham excepted to the matter being decided on motion, and contended that matters of this nature were only decided on motion in cases in which all parties consented. Further, all the facts were not before the Court.

Mr. Schreiner urged that it had been the practice of the Court to decide such questions on motion when all the parties were before the Court. He referred to "*In re Henning*" (7 Juta, 58). The only question before the Court was the interpretation of the will.

The Court ordered the matter to stand over till Thursday, the respondents to file affidavits.

Postea (August 11).

The affidavits having been read,

Mr. Schreiner, Q.C., contended that the general principle was that the will spoke from the death of the testator. There must be somebody then to whom the property is to pass. Where there is a direct bequest to children it must speak at the time of death. "Children" means those alive at testator's death. The intention of the testatrix must be looked at.

The Chief Justice remarked that Voet (28, 5, 18) seemed strongly against the contention that only children born were meant.

Mr. Schreiner (continuing). The intention here is clearly to benefit only children already born. He quoted "*In re Henning*" (7 Juta, 58); "*J. Brealer v. Kotze*" (2 M, 444). Schlemmer's case (decided in 1886, not reported) was also referred to.

Mr. Graham urged that as to the meaning of "children," the case of "*In re Beck's Estate*" (1 M., 882) was much in point. The testatrix clearly intended all children born or to be born. The distribution is for this reason postponed until the death of her brothers and their spouses. See "*Du Preez v. Du Preez*" (1 J., 259), "*Pretorius v. Pretorius*" (2 J., 298), Voet (28, 5, 18), Van Leeuwen (Cen. For. I., 8, 8). Testatrix's intention was clearly to benefit all children of her two brothers. If the parent renounces his interest the fiduciaries take at once. He cannot renounce in favour of some only.

Mr. Schreiner was heard in reply.

Cur ad vult.

Postea (August 80).

The Court delivered judgment.

The Chief Justice said: This application raises a question of construction of a somewhat obscure

passage in a will. The passage is as follows: "I hereby declare to appoint and to nominate, as my sole and universal heirs, the joint children of both my brothers, Willem Adriaan Wentzel and Stephanus Brink Wentzel, in equal portions, as also their descendants by representation 'staaksgewijze'), with this condition, that both my brothers and their present spouses shall, during their lifetime, be entitled to receive the interest on the residue of my estate in such manner that each of my brothers aforesaid, or his surviving widow, receive the half of such interest each," and so on.

The applicants are four of the children of Willem Adriaan Wentzel, a brother of the testatrix, and they apply for leave to their father to renounce his life interest in their favour in order that the respondents, as executors of the will, may at once pay out to them their shares of inheritance. It is obvious that no order can be made unless the shares are now capable of being ascertained, and that the shares cannot be so ascertained if children still unborn may hereafter be admitted to share in the inheritance. The main question therefore is whether the testatrix intended to appoint as her heirs those children only of her brothers who should be born before her death.

It is obviously impossible to lay down any general rules of construction which shall be applicable to every case that may arise. The object must always be to ascertain the testator's intention and for that purpose rules of construction or decided cases may be used to assist the Court, but they cannot be allowed to thwart the testator's intention as gathered from the whole context of his will.

In "*Bresler v. Kotze's Executors*" (2 Menz., 444) the Court was satisfied from the context of the will and the special circumstances of the case that a direction that in a certain event a portion should devolve upon the children of the testator's daughter extended only to such children as should be alive at the date of his death. So also in the case of "*In re Henning*," (7 Juta, 58) there were indications in the will of an intention that the distribution of the fund should take place upon the eldest of certain children of the testator attaining a certain age, and as the Court assumed, after counsel's admissions, that the eldest had attained such age before the death of the testatrix it was held that the objects of her bounty were the children born before her death. In neither of those cases did the Court lay it down as a general rule that a bequest to the children of a certain person as a class necessarily includes only those born before the testator's death.

Even where the period of distribution is not postponed to a date subsequent to the death of the testator the presumption of our law, differing in this respect from the law of England, is in favour

of the view that he intended to include children born after his death. According to Voet (28, 5, 18) a testator who has brothers and nephews, being sons of such brothers, and appoints such nephews as his heirs, is presumed in the absence of any indication in the will of an intention to the contrary, to have intended to include all children born after the testator's death. This presumption arises out of the nature of the relationship between the testator and the objects of his bounty.

The fact that the period of distribution has been postponed till the happening of some event after the death of the testator, so far from weakening, would tend to strengthen this presumption.

On the other hand, if he clearly intended that on the happening of the event the inheritance should devolve immediately on the heirs, that would in itself be an indication of the testator's intention that children born after such event should not be included.

In this respect the English law adopts a similar rule of construction, for it has been held that a gift to children, preceded by a life interest, includes the children living at the death of the testator and those who come *in esse* in the lifetime of the prior devisee or legatee whose death is made the period of distribution.

In the present case, the children of the brothers of the testatrix have been appointed heirs but subject to the life interest of such brothers. The brothers are still alive, and it is admitted that it is quite possible for them to procreate more children.

I am, therefore, clearly of opinion that it is as yet impossible to ascertain the shares to which the applicants will ultimately be entitled, and that the application ought accordingly not to be granted.

There will be no order, but the costs may fairly come of the estate.

Mr. Justice Buchanan and Mr. Justice Upington concurred.

[Petitioners' Attorneys, Messrs. Findlay & Tait; Respondents' Attorney, C. O. de Villiers.]

SMIT V. GABIER. { 1892.
4th Aug.

Mr. Juta appeared for the applicant, and Mr. Shell for the respondent.

Mr. Juta moved for an order requiring the respondent to pay the costs occasioned to applicant in obtaining an interdict restraining him from obstructing a certain common passage in the premises known as Marais' Cooperage, between Loop, Bree, and Bloem-streets, Cape Town. The facts were as follows:

On the 14th July last the applicant presented a petition to Mr. Justice Upington, in Chambers, praying that an order might be granted interdicting the respondent, or anyone acting under him from obstructing the common passage reserved for

lots 2, 8, 4, 5, 6 and 7, Marais' Cooperage, by vehicles or otherwise.

On this petition a rule nisi, which operated as an interdict, was granted, and was duly served on the respondent; a copy of the petition was not, however, served on him, nor was there a prayer for costs in the petition, nor in the rule nisi.

On the return day, 20th July, the rule was made absolute. The Court however refused to give costs against the respondent, as they had not been asked for in the petition. The applicant to make a further application.

Mr. Juta was now heard in support of the application, and contended that the respondent's defence that he could not read English and did not know what the rule nisi meant was bad in law.

Mr. Sheil was heard for the respondent, and urged that if it had not been for the present application nothing more would have been heard about the matter.

The Chief Justice in giving judgment said: In the original petition on which the rule nisi was granted there was no prayer for costs; if there had been, costs in all probability would have been mentioned in the rule nisi, and in that case the respondent would have been liable, and would have been ordered to pay. When the rule was made absolute the matter of costs was referred to, but the Court refused to grant them, with leave to the applicant to make a further application. This application is now being made, and the whole question reopened. The affidavits were very conflicting and in order to get at the truth it would be necessary to have a trial and hear witnesses. This might be avoided by dismissing the present application with costs, except the costs of the respondent's affidavits.

SCOTT V. BARNARD. { 1892.
4th Aug.

Magistrate's jurisdiction — Counterclaim —
Compensation—Liquid and illiquid claims
—Unliquidated damages.

In an action upon a promissory note for £15 in a Magistrate's Court the defendant admitted the debt and claimed in reconvention the sum of £20 as unliquidated damages for the plaintiff's breach of contract. Held, that the Magistrate had jurisdiction to try the counterclaim.

The cases of Smith v. Ramsbotham (Buch. 1878, 98), De Jager v. De Jager (3 Juta, 69), and Brady v. Michiel (3 Juta, 178) distinguished.

This was an appeal from a decision of the

Resident Magistrate of Barkly East. The appellant had been sued on a promissory note for £15. He admitted his liability, but pleaded that he had a "set-off" of £20 damages against the plaintiff. This amount was alleged to be due for the breach of a contract by the plaintiff (now respondent) in selling a number of sheep to defendant. The Magistrate held that an illiquid claim could not be set up against a liquid document, and dismissed defendant's claim in reconvention.

Mr. Juta, for the appellant, submitted that the Magistrate was clearly wrong. He had misunderstood the case of "Smith v. Ramsbotham" (Buch. 1878, p. 98). In that case the claim in reconvention was clearly beyond the Magistrate's jurisdiction, and hence is distinguishable from the present case.

Mr. Molteno for the respondent.

In delivering judgment, the Chief Justice said: The plaintiff sued the defendant in the Court below on a promissory note for £15. The defendant admitted the debt, but claimed by way of unliquidated damages for breach of contract the sum of £20. The Magistrate gave judgment for the amount claimed by the plaintiff, but held that in view of the decision of the Court in "Smith v. Ramsbotham" (Buch. 1878, 98), he was precluded from trying the counter-claim. In that case, however, the counter-claim was far in excess of the plaintiff's claim and of the Magistrate's jurisdiction, and inasmuch as the counter-claim was not of such a nature as to admit of "compensation" this Court held that it could not be pleaded as a defence of "set-off" against the plaintiff's claim. There is no conflict between that case and the two subsequent cases of "De Jager v. De Jager" (3 Juta, 69) and (Brady v. Michiel (3 Juta, 178), although it must be admitted that the headnotes of these two cases would suggest such a conflict. In both of these cases it was assumed that the counter-claims were of a liquidated nature and admitted in law of compensation. The counter-claims were illiquid in the sense that they were not founded upon written acknowledgments of debt, but they were not (as in "Smith v. Ramsbotham") in the nature of claims for unliquidated damages, and as such incapable of being pleaded in "compensation." The distinction is so well known and has so often been recognised in this Court that it somewhat surprises me to find it so often lost sight of. In the present case the counter-claim is for unliquidated damages, but (differing in this respect from "Smith v. Ramsbotham") the amount is within the Magistrate's jurisdiction, and there was absolutely no reason therefore why he should not have tried it. The appeal must therefore be allowed with costs as to the counter-claim, and the case must be remitted to the Magistrate to try the counter-claim and to

decide the question of costs in the original as well as the subsequent hearing.

Mr. Justice Buchanan and Mr. Justice Upington concurred.

[Appellant's Attorneys, Messrs. Fairbridge & Arderne; Respondents' Attorney, J. W. Sauer.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN { 1892.
and Mr. Justice UPINGTON, } 6th & 8th Aug.
K.C.M.G.]

MICHAU V. ANDREWS.

Account—Balance—Action—Alleged partnership—Claim in re-convention.

Mr. Juta and Mr. Webber appeared for the plaintiff, and Mr. Schreiner, Q.C., and Mr. Castens for the defendant.

This was an action instituted by Mr. Jan Johan Michau, an attorney of the Supreme Court practising at Kimberley, against the defendant, Mr. Henry Hardwicke Andrews, of Burghersdorp, for the sum of £589 10s. 4d., with interest *a tempore mora*, alleged to be the balance of an account due by the defendant to the plaintiff for moneys advanced and paid by the latter to the former, and moneys received by the defendant for and on behalf of the plaintiff at various times during the years 1889 and 1890, as per the account annexed to the declaration.

The defendant, after admitting the formal allegations in the declaration, pleaded that before 1st May, 1890, the plaintiff, who carried on business as an attorney, agent, and auctioneer, at Burghersdorp, and the defendant, who carried on business as an agent and auctioneer, entered into an agreement by which they, until that date, carried on business together, but not in partnership, upon terms and conditions not necessary here to set forth.

That the said agreement was cancelled for one year, from the 1st May, 1889, and another agreement was entered into, which was signed by the plaintiff on the 6th day, and by the defendant on the 26th day of May, 1889 (Copy of which was annexed to the plea.)

That the said agreement constituted an agreement of partnership between the plaintiff and defendant for the year from 1st May, 1889, to 1st May, 1890, and the defendant, during the plaintiff's absence in Kimberley, carried on the business in the name of the plaintiff at Burghersdorp, and also a branch at Molteno, under the said agreement, and performed all the conditions thereof.

That after the expiration of the said year the defendant had, from time to time, requested and demanded from the plaintiff that he should come to a settlement of the affairs of the said partnership, and should pay to the said defendant such sum as was due to him, upon a true statement of profit and loss, after deducting such sums as might be found to be due from the defendant to the business, but the plaintiff had failed and neglected to meet the defendant for the purpose of effecting such settlement and determining the amount which was due to the defendant.

The books of the said business were in the hands of plaintiff, and the defendant was therefore not now able to frame an account showing the true position of the account between him and the plaintiff, or to debate the several debit items which the plaintiff had included in the account annexed to the declaration, many of which the defendant disputed and denied.

The defendant submitted that in law the plaintiff was not entitled to have and maintain this action in respect of the particular matters set forth in the account annexed to the declaration, and that the respective rights of the parties could only be determined after a correct statement of account between the partners, including a statement of profit and loss, had been framed, and either agreed upon or fixed by judgment of a competent court.

That the balance of profit on the said account would be a sum of not less than £880, and the defendant was entitled in account with the plaintiff to half of that balance.

That the defendant was also entitled, in account with the plaintiff, to a commission of 5 per cent. for collection on all sums collected by him for the business after the termination of the partnership.

That the defendant was further entitled to a sum of £120, as remuneration for work and labour done and services rendered to the plaintiff, at his special instance and request, during the year of the said partnership, in respect of the private business of the plaintiff, and matters unconnected with the business of the said partnership.

That upon a true statement of accounts between the parties a large balance would be found to be due by the plaintiff to the defendant, but by reason that the books of the business were not in his hands as aforesaid, the defendant was unable to state the account of such balance for the information of the Court. Wherefore he prayed that the plaintiff's claim might be dismissed with costs.

The defendant claimed £120 in reconvention, and prayed for:

(a) An order compelling the plaintiff, within such time as the Court might fix, to render a true, full, and final account for the liquidation of the said partnership business, and to debate such account with the defendant,

(b) An order declaring that the defendant was entitled to receive, and have in his custody during such reasonable time as the Court might fix, all books connected with and showing the transactions of the said partnership business.

(c) Judgment for such sum as after debate of the said account might be found at foot thereof to be due to the defendant.

(d) Judgment for £120.

(e) Other relief.

(f) Costs of suit.

To this plea a replication was filed and issue joined.

Mr. Juta called

Mr. J. J. Michau, who stated that he was an attorney at present practising at Kimberley, but formerly at Burghersdorp, with a branch office at Molteno. Andrews had been associated with him since 1886, and up to May, 1889, he was paid by a share of the profits. He kept all the books. Andrews was paid one-fourth of the profits of the agency, and one-half of the auctioneering profits. In 1889 witness went to Kimberley, his intention being to go to Kimberley for a year, and then return. It was agreed verbally that Andrews should carry on the business, and was to get half the profits, but not draw more than £25 per month. No written agreement was ever entered into. Mr. Brown, an attorney, remained in the office at a fixed salary. Witness forwarded a draft agreement to Andrews for signature, but he would not consent to it. The verbal agreement remained. Andrews only sent accounts to Kimberley irregularly, and he had control of the books. In September, 1889, the business was sold to Smit & Van den Heever, Andrews being kept on as under the old agreement. Andrews had to liquidate the old business. There was no arrangement as to the amount he was to receive for collecting accounts. The witness now had the books in his possession, having brought them from Burghersdorp in 1889 (December). The Molteno books were sent to him, but he was unable to draw up a statement. Andrews sent a statement in November, 1891. In that he made no claim for £120 salary. There appeared to be no profits from the business. Andrews had never paid in the amounts he collected. He collected over £1,800. It now appeared that £45 disputed had been correctly brought up by Andrews. Andrews was entitled to half the profits of the Deputy Sheriff account, and to one-quarter of the profits of speculation. There was only one speculation. Andrews's share would be £8 10s. Andrews shows a credit on his auction account. This is wrong, and is made by wrongly bringing up a large item. Andrews explains this in his accounts. It belongs to his Molteno agency, but not to his auction account. In his agency account he mixes up items before and after 1st

May, 1889. His real share is £88 before 1st of May. From the 1st of May the profit was £470 odd. On the charges account Andrews has deducted a balance of £164 odd twice in error. The salary of Mr. Brown and the clerk were expenses of the business, but Andrews has not borne his share. The interest account is correct. £10 is due to Andrews for auditing, but not more. Witness had never agreed to pay 5 per cent. commission on amounts collected. He was willing to allow 2½ per cent. on certain amounts. As to his £120 salary, witness said he did not know what services had been rendered by Andrews. There was no arrangement about his coming from Molteno to Burghersdorp. Under the old agreement, Andrews had to bear all the losses on the auction account. The first time he heard of a partnership being mentioned was when he saw the plea.

Cross-examined by Mr. Schreiner, Q.C. The only agreement was a verbal one. The draft is annexed to the plea. He did not remember producing the draft or a copy of it in the arbitration of Andrews and Smit and Van den Heever. He could not produce the letter-books, and had no press-copy books; he had only the account books. He had not promised to send a statement. He had not refused to return the books after July, 1891, but did not think he had promised to do so. Andrews often asked him to come to Burghersdorp and settle the accounts, but he could never stay long enough. He refused to have an inspection by an accountant. He sued in February. In Herbert's estate he was practically the objector to the account. This is the same estate as figures in the auction account. He had himself made many entries in the books. He had brought an action against Siebusch and recovered judgment. He annexed an account to the affidavit in that matter. He recovered £80, and put it to his own credit in his books. This matter arose before 1889, and he did all the business himself. The agency account is credited with all the profits in this matter. There is no account to show how the balances in Hattingh's estate were settled. The work was done in 1889. In the list of ledger balances made up by him Botha's estate does not figure. The balance was never received. The estate was closed in 1887. It was paid at the time by setting off account sales. He had received a commission for winding up the Albert District Syndicate. This work originally came from Burghersdorp. He knew sheep were bought. He did not know how they were dealt with. The agency account is wrong, as amounts are not distinguished by any dates. The books were not balanced when the arrangement was made in April. The auditing of Knobel & Michau's books was difficult, but £10 10s. would be good remuneration. Com-

pensation was never offered to Andrews for going to Molteno.

Re-examined by Mr. Juts: The balances of Slebusch and Hattingh's estates were set off against £160 sent by witness to Burghersdorp to pay certain minors' inheritances.

H. H. Andrews, examined by Mr. Schreiner, stated he was the defendant. In 1889 Michau wished to leave Burghersdorp for Kimberley, and a verbal agreement as to partnership was entered into. He had never any doubt he was sharing the net profits. He had to leave Burghersdorp for Molteno suddenly in the interests of the business, and Michau promised he should be compensated. He had lost rent through having to go. Before Michau left he offered defendant 5 per cent. on all amounts collected, and asked him to liquidate his old business when it was sold to Smidt & Van den Heever. He also agreed to pay some salary. Witness did a good deal of work for Michau privately; £100 would be fair remuneration. He had accounted for all moneys collected. The commission on £880 collected is credited to witness in Michau's own handwriting. De Klerok's bill was discounted and proceeds put to Michau's account. It was paid in instalments. He thought Michau had to take it up when dishonoured. There were only three transactions on the speculation account. He claimed one-half of the profits, because it was practically the auctioneering account. The £164 alleged to have been debited twice is correct. It should have been debited to the Molteno account more correctly. It is not a loss at all. His statement of the agency account was correct. The agency account is never debited with anything. His charges account distinguished items before and after May. This is all a debit account. The £164 had to be deducted in order to arrive at the balance to be distributed before and after May 1, 1889. On July 26, 1889, plaintiff wrote that he was willing to pay some salary. In September commission and salary were again promised. Michau should pay his clerk's salary himself. The items in schedule B marked "in 1889" were covered by the settlement. Mr. Brown left in October, 1889, and the partnership should not bear the cost of his salary. His salary and part of the office rent must come off the charges. He was appointed auditor by the Court with Hoffa. The work took a month; £21 is a reasonable fee. Hoffa got £25, but he drew up the statement. He and Hoffa arranged the amount. The £21 is passed through the statement of May, 1890. In the auction account the two losses of Herp's estate and Houset's were on credits undertaken at the instance of Michau. On insolvency Michau himself bought a life policy to cover the loss. Houset's account is still unsettled. He had got £80 from Houset. The balance is not brought into account, as the loss is still unascertained.

He had not taken credit in the agency account after May for work done before. Entries were by himself and Michau. He had done a great deal of the work in connection with the Albert District Gold-mining Company. It was a partnership profit. All the books of the company were at Burghersdorp. No credit is entered for allowances. In estates of De Kook, Hattingh, and De Wet they had worked together. There is no entry of money received under judgment of the Court in Slebusch's matter. In Hattingh's estate he had paid out most of the heirs. Michau may have paid a few. Slebusch, the executor, had not been credited with over £50, executor's commission. There was no mention of Botha's estate in the credit balances. Michau had made numerous entries in the books while he had them at Kimberley, to which he (witness) had objected. He had offered to meet Michau at Kimberley and settle the whole matter if he would advance him £10. He was sued in February. He only saw the books again when the claim in reconvention was filed. The bank-book was always in Michau's possession. He never drew more than £80 a month.

Cross-examined by Mr. Juts: He had had possession of the books for ten months. The agreement was only signed early in July or at the end of June. He wrote as he did in February, denying receiving £100, as he did not know that he was bound by the agreement if there were errors in the account. The business was a big one, and he claimed compensation for working it. He could not remember the number of animals bought on the speculation account. Brown's salary was paid after September partly by Smidt and Van den Heever.

Mr. Michau, recalled by the Court, admitted that £60, Brown's salary, appeared to be for the time after he (Brown) had left.

Counsel addressed the Court, each item in dispute being discussed separately.

The Court gave judgment for the plaintiff for £462 11s. 1d. with costs.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. 11th Aug.
Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

SELLAR BROS. V. THEUNISSEN.

Mr. Thorne moved for provisional judgment upon three promissory notes, made by defendant in favour of plaintiffs, for the sums of £80 18s. 4d. (less an amount paid on account), £48 14s. 4d., and £26 18s. 4d.

The order was granted.

REHABILITATION.

On motion from the bar, the Court granted the rehabilitation of Hendrik Jacobus Gysbert van der Westhuizen.

ADMISSION.

Ex parte HAYTON.

On the motion of Mr. Schreiner, Q.C., Arthur Emil Hayton was admitted as an advocate; the oaths to be taken before the Registrar of the Eastern Districts Court.

GENERAL MOTIONS.

SMIT V. SMIT.

On the motion of Mr. Sheil, the rule *nisi* was made absolute allowing the applicant to sue in *forma pauperis* in an action against his wife for restitution of conjugal rights, failing which for divorce.

In re BOUWER'S ESTATE. { 1892.
11th Aug.

Transfer duty—Act 5 of 1884, Section 19, sub-section 3—Exemption—Mutual will—Legatees.

Under the Transfer Duty Act of 1884, Section 19, sub-section 3, legatees are entitled to exemption only on their ab intestato share in the particular property to be transferred to them, and not on their ab intestato share in all the immovable property in the estate.

Mr. Schreiner, Q.C., moved for an order requiring the Registrar of Deeds to transfer to the

children and heirs of the deceased certain landed property in the estate, on the basis that each of such heirs is exempt in respect of transfer duty, *ab intestato*, to the extent of £1,500.

It appeared from the affidavit of Mr. Petrus L le Sueur:

That the late William Christian Bouwer and his wife Maria Aletta Bouwer, married in community of property, on the 14th October, 1875, executed a mutual will, and gave and bequeathed to their son Johannes Lodewyk Bouwer the farm Mapassa Leven, on the condition that he was to pay his two sisters each the sum of £666 18s. 4d.; and gave and bequeathed to their daughter Cornelia Susannah, married to William Christian Durant, the farms Waters Meet and Mapassa's Kraal during her life, and upon her death the said farms to go to her children, and with the further conditions that she was to pay the sum of £250 to her brother Johannes and £250 to her sister Elizabeth; and the testators further gave and bequeathed the farm Stichel to their daughter Elizabeth Christina, married to Johannes Stephanus Pretorius.

That the testators were both dead, leaving them surviving the children referred to in the last paragraph.

That the heirs were desirous of having the properties bequeathed to them transferred into their own names, and that the executors had signed the necessary papers for that purpose, but upon the deeds being presented to the Registrar of Deeds, he declined to pass them unless transfer duty to the extent of two-thirds of the valuation of the properties above mentioned was paid, and based his demand upon the 19th section of Act 5 of 1884, sub-section 3.

That the Registrar of Deeds evidently treated each farm separately and distinctly, and allowed each heir one-third share of each farm and demanded duty on the remaining two-thirds.

The heirs submitted that the Registrar of Deeds placed too limited a construction upon the word "property" in the above sub-section, and contended that the word "property" would and did include all the properties that were bequeathed to the heirs, and that they should be taken together and not singly.

That the farm Mapassa Leven was valued for Divisional Council purposes at £2,000, the farm Stichel at £1,000, Mapassa Kraal and Waters Meet at £1,500—in all £4,500—and the heirs contended that each was entitled, as an heir *ab intestato*, to one-third of the full value of the property, to wit, of £4,500, and that each was exempt under sub-section 3 as if an heir *ab intestato* to the extent of £1,500.

The heirs submitted that their construction was more reasonable, for the reason that if the testators had bequeathed their four farms to their

children jointly in equal shares and proportion instead of giving as they had done a farm to each, the children would have been exempt from the payment of duty altogether, and under sub-section 10 of section 19 of Act 5 of 1884, they could as joint owners have agreed upon a voluntary partition and thus escaped the payment of transfer duty.

It was further submitted that even assuming that the contention of the Registrar of Deeds was correct, it could only bind Johannes Lodewyk and Elizabeth Christina Pretorius, for the reason that Cornelia Susannah Durand having a life interest only on the farms bequeathed would be exempt under sub-section 11, and her children will be exempted under sub-section 2.

The Registrar of Deeds' report was as follows :

So far as concerns Johannes Lodewyk Bouwer and Elizabeth Christina Pretorius (born Bouwer), the words of sub-section 8 of section 19 of Act 5 of 1884 seem clearly to show that each of these two legatees is entitled to exemption from duty only on his or her *ab intestato* share in the particular property to be transferred to him or her, and not on his or her *ab intestato* share in all the immovable property in the estate.

As regards the legatee Cornelia Susannah Durand (born Bouwer), I am quite prepared to record her limited interest without payment of transfer duty.

It seems somewhat anomalous that where property is bequeathed unconditionally, the legatee, being a descendant of the testator, is entitled to exemption only on so much of the value of the property bequeathed as represents his share in such property considered as if he were an heir *ab intestato*, whereas if the property be bequeathed subject to a *fidei commissum*, the usufructuary, being a descendant of the testator, can have his life interest registered free of duty ; and the heir in remainder, being a descendant of the testator within the fourth degree, can likewise have his clear title registered without payment of duty. Yet such seems to be the law (*vide* Act 5 of 1884, section 19, sub-sections 2, 11, and 12).

Mr. Schreiner submitted that the whole estate must be taken jointly, not as if there were specific bequests (see sub-section 8, section 19, of Act 19 of 1884.) The male applicant is called upon to pay duty for more than he actually receives.

In delivering judgment, the Chief Justice said : In this case the testator had made specific bequests to three parties. If the bequest had been of his whole property in three shares, the argument might have been of some force, but in the face of the section it was quite impossible to give relief. The Act enacts that in a case like this "Any heir or legatee of any person, being such a person as has been above described under section 2, who shall require to have any of the immovable

property inherited by him from the deceased, or by the deceased legated or prelegated to him, removed from the name of the deceased into his own name, shall not be chargeable with duty upon the amount of his share in the property so to be transferred in case or supposing that the deceased died intestate." The applicant's share *ab intestato* is only one-third of that which has to be transferred to each, and only to that amount can the exemption be allowed. The Court cannot alter the intention of the Legislature, and the application must be refused.

IN THE ESTATE OF A. A. LILIENFIELD.

On the motion of Mr. Sheil, the Court granted an order authorising the Registrar of Deeds to amend certain three mortgage bonds passed in favour of the said Lillienfield, by substituting therein his correct name of Abraham Albert Lillienfield in place of the incorrect one of Albert Abraham Lillienfield.

IN THE ESTATE OF THE LATE JANTJE UMHLEBI.

This matter was before the Court on the 8th May last. The petitioner was the son of one Jantje Umhlebi, and alleged that a farm left by deceased should devolve on him as heir at law by native custom. Further information was wanted, and the matter was referred to the Resident Magistrate of Glen Grey. He reported that applicant was entitled as heir to the deceased.

Mr. Tredgold moved for authority to the Registrar of Deeds to pass transfer. There was no machinery apparently to carry this out. From the deed of grant to Umhlebi of the farm, it appeared that the grant was to him personally (no heirs or successors being mentioned), and with a prohibition to lease or sell the land without the consent of Government.

The Court ordered the matter to stand over for the present.

In re CAPE OF GOOD HOPE BANK.

On the motion of Mr. Schreiner, Q.C., the Court sanctioned the compromise of H. S. Caldecott, of Johannesburg. The debt owing amounted to £42,603 17s. 1d., for which he offered a bond for £1,000, passed by Mrs. M. J. Caldecott in favour of the liquidators, over her house in Johannesburg, and all the securities in the bank's possession, valued at £10,805 17s. 6d.

PETITION OF A. WILSON.

Mr. Tredgold moved for authority to the

Registrar of Deeds to amend a transfer, dated 19th September, 1887, of a piece of land near Wynberg, being lot 159, by altering 1 morgen 442 square roods 85 square feet to 2 morgen 442 square roods 85 square feet.

The Court granted a rule nisi calling on all parties interested to show cause on last day of term why the amendment should not be made. The rule to be served on Maynard's executors who gave transfer.

IN ESTATE HELENA L. DE LANGE.

Mr. Webber moved for leave to the executor testamentary to raise a sum of money on mortgage of the landed property in the estate for the purpose of satisfying debts on the same. It appeared however, that there were just sufficient movables to satisfy all debts, and the Court refused the order, it being the executor's duty to settle all debts at once from the movables.

HELLABY V. HELLABY.

Mr. Juta appeared for the plaintiff; the defendant was in default.

This was an action for restitution of conjugal rights, instituted by Mrs. Gertrude Hellaby (born Lyons) against her husband by reason of his malicious desertion.

Mr. Norman Lacy, of the Colonial Office, having given formal evidence in proof of the marriage, counsel called the plaintiff.

Mrs. Hellaby, who deposed that she and the defendant were married in Kimberley on the 22nd January, 1877. Five children were born of the marriage, two of whom were still living, a girl, aged eleven, and a boy, aged nine. In 1885, acting on medical advice, plaintiff left Kimberley, with the knowledge of her husband, and came to Cape Town, where she embarked in business as a dress-maker. Some months after her arrival in Cape Town she met the defendant, who told her that he had got into pecuniary difficulties and intended to leave the Colony. He subsequently went to South America, then returned to London, and afterwards went to New Zealand. She had received letters from the defendant from all these places. The last communication she had had from her husband was a letter written from Johannesburg, received about eighteen months ago, in which he promised to send her money, but had not done so; as a matter of fact, she had supported herself and her children since 1885.

By the Court: All the letters which she had received from her husband had been destroyed.

Mr. Justice Upington remarked that in several recent divorce cases the correspondence which had passed between the parties appeared to have been

destroyed, and he expressed the opinion that it was very desirable that letters which had passed between parties to divorce proceedings should be produced at the trial.

The Court granted an order calling upon the defendant to restore to plaintiff her conjugal rights on or before the 1st day of October, and failing compliance with the order, to show cause on the 12th October why a decree of divorce should not be granted. One publication to be made in the *Governant Gazette* and one in the *Johannesburg Star*.

VAN ZYL V. SIMENHOFF BROS. { 1892.
11th Aug.

Purchase—Repudiation—Agency—Evidence
—Appeal.

Mr. Castens appeared for the appellant, and Mr. Juta for the respondents.

This was an appeal from a judgment of the Resident Magistrate of Robertson, sitting at the Periodical Court, Montagu.

The defendants (present respondents) were sued for £7, being the difference between the purchase price of certain 5,000 oranges and 4,000 naartjes bought by the defendants from the plaintiff on the 31st May, 1892, at 4s. per 100 oranges and 2s. per 100 naartjes, and the price which the fruit realised after being refused by the defendants.

The following are the facts, as found at the trial:

On 31st May, 1892, Mr. P. C. van Bloemenstein was authorised by defendants to purchase oranges and naartjes on their account from sundry parties.

On the said day Van Bloemenstein did so purchase oranges and naartjes from plaintiff and others.

The price at which he bought from plaintiff (who is his brother-in-law) was for oranges 4s. per 100, and for naartjes 2s. per 100, whereas the prices at which he purchased on the same day from other farmers averaged for oranges from 2s. to 2s. 6d. per 100, and for naartjes from 1s. 8d. to 1s. 6d. per 100.

On his return the said Van Bloemenstein advised his employers (the defendants) of the quantities of oranges and naartjes which he had that day purchased on their account and at what prices, and a memo. was then and there made of the said purchases, and from the memo., which was subsequently corroborated, it appeared clear that the defendants were told that there had been bought from the plaintiff about 8,000 oranges at 4s. and about 1,000 naartjes at 2s. per 100.

On the 10th June, 1892, the plaintiff brought the oranges and naartjes to Montagu, told the defend-

ants the quantity on the wagon, viz., 5,000 oranges and 4,000 naartjes, but when the defendants saw the fruit they refused to take the load as tendered, on account of the quantities being far in excess of what had been bought by Van Bloemenstein, and also on account of there being so many small oranges and naartjes in the load.

The fruit was subsequently sold for 2s. and 1s. per 100 respectively, and the purchaser just cleared himself on the re-sale in Cape Town.

The Magistrate gave judgment for the defendants with costs, on the grounds, *inter alia*: (1) That the fruit, samples of which were produced in court, was not marketable (leverbaar), and that the defendants were justified in refusing to accept the whole load; (2) that he (the Magistrate) was satisfied that only between 2,000 or 3,000 oranges and about 1,000 naartjes were bought by the defendants, and that they were agreeable to take the said quantities, and even offered to take the whole, provided the small ones were withdrawn.

From this judgment the plaintiff now appealed.

Mr. Castens was heard in support of the appeal, and contended that the Magistrate erred in his judgment, as there had been a concluded contract between the parties, and that the defendants were bound by that contract. Further that the Magistrate had admitted evidence which was merely hearsay, and on that evidence had wrongly based his judgment.

The Court, without calling upon Mr. Juta, expressed the opinion that the case was purely one of fact, that the finding of the Magistrate was correct, and dismissed the appeal with costs.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinne; Respondents' Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT

[Before Sir J. H. DE VILLIERS, {
K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. 12th Aug.
Justice UPINGTON, K.C.M.G.}]

MOTION.

In re JANTJE UMHLEBI, DECEASED.

In this matter, heard yesterday, Mr. Tredgold moving, the Court granted a rule nisi, returnable on the last day of term, calling upon all parties interested to show cause why the Registrar should not be ordered to pass transfer of the farm Matyantiya, in the Glen Grey district, to the eldest son of the deceased.

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CONTAT V. WARD AND OTHERS. { 1892.
12, 13, 15, 16
& 22 Aug.

Concessions—Prospecting and mining rights
—Cession—Option of purchase—Declaration of rights—Action.

Mr. Forster and Mr. Guerin appeared for the plaintiff; Mr. Solomon, Q.C., and Mr. Schreiner, Q.C., for the defendants Ward and Corbridge; and Mr. Juta and Mr. Castens for the defendants Eland and Seavill.

This was an action instituted by Joseph Contat against Henry Alfred Ward, William Isaac Corbridge, Alfred Eland, and Cecil Elliot Seavill for: (1) An order declaring his rights as against the defendants under certain agreements referred to in the declaration; (2) for payment of the sum of £2,500, with interest *a tempore mora*; (3) for transfer of forty claims in the Wesselton mine upon the farm Speculatie, in terms of a certain agreement, or to pay the sum of £40,000; (4) for transfer of twenty claims in the Premier mine upon the farm Benauwdheidsfontein, in terms of another agreement, or to pay the sum of £100,000. This latter claim was first abandoned and afterwards renewed.

The plaintiff's declaration was as follows:

1. The plaintiff and defendants are all residents at Kimberley, in the Province of Griqualand West.

2. On or about August 18, 1885, the plaintiff obtained from the duly-authorized agent of Jacobus Johannes Wessels, then registered owner of the farms Oliphantsfontein and Benauwdheidsfontein, situate partly in the Province of Griqualand West and partly in the Orange Free State, certain prospecting and mining rights and concessions in and over a certain portion of the said farm called Speculatie. The plaintiff annexes hereto, marked A, a copy of the written agreement embodying the said concessions.

3. On the same day the plaintiff obtained from one Daniel Johannes Russouw, a son-in-law of the said Wessels, who had authority to grant the same, a concession in similar terms to that marked A in respect of a portion of the said farms Oliphantsfontein and Benauwdheidsfontein, styled Uitzicht; a copy is annexed, marked B.

4. On or about March 1, 1886, the plaintiff entered into a written agreement (a copy of which marked C is annexed) with the defendant Corbridge, whereby the plaintiff ceded all his prospecting rights over Speculatie and Uitzicht to Corbridge for two months from the said date, and agreed to give the said Corbridge the option of purchasing all his interests in the said agreements for £2,500, £500 whereof was to be paid in cash

and £2,000 out of the first revenue derived from the said concessions; the plaintiff further reserved the right to select forty claims in a diamond-mine called the Wesseltion mine, which had then been discovered upon Speculatie, and to the choice of twenty claims in any new mine that might be discovered upon the properties affected by the said concessions; thereafter upon a survey of the said Wesseltion mine the plaintiff selected the said forty claims as aforesaid.

5. Upon the same day, to wit March 1, 1886, an agreement was entered into between the defendants Eland, Seavill and Corbridge that each should share equally in the plaintiff's concessions but that Corbridge should have the sole control of all negotiations and matters connected with the said concessions; in entering into the agreement in paragraph 4 set forth the said Corbridge acted for himself and for the said Eland and Seavill, who also became bound by the terms of the said agreement, which is annexed and marked D.

6. Thereafter, on or about April 28, 1886, the agreement in paragraph 4 set forth was renewed until June 1.

7. Thereafter, in or about June, 1886, a further agreement was entered into between the plaintiff and the defendant Corbridge, acting as before, whereby it was agreed that the said Corbridge should exercise his option, and that, instead of the former provision relating to the sum of money to be paid to the plaintiff, the purchase price of the concession should be £2,500, and that the whole amount should be paid to the plaintiff out of the first proceeds derived from the said concessions, and upon certain other terms and conditions which will appear from the annexed copy.

8. On or about June 29, 1886, it was further agreed that the plaintiff should during the next twelve months give all assistance in his power in connection with the said concessions, the defendant Corbridge to advance the necessary funds. This agreement was supplementary to, and is attached to, the last-mentioned agreement.

9. On or about July 6, 1886, in pursuance of the agreements in paragraphs 7 and 8, the plaintiff executed a formal cession of all his right, title, and interest in and to the said concessions to the defendant Corbridge, acting as aforesaid, and subject to the above agreements, and the said transfer was thereafter allowed and confirmed by the said Wessels.

10. Thereafter, in or about July 31, 1886, the four defendants entered into a written agreement whereby the defendant Ward agreed to provide £200, payable weekly in sums of £25, for the completion of the prospecting at the New Mine or Speculatie, and in consideration thereof defendant Corbridge, acting as aforesaid, agreed to assign to Ward one-fourth share in the above concessions ceded by the plaintiff.

11. The defendant Ward had at the said date full knowledge of the agreements above referred to between the plaintiff and Corbridge, and of the cession by plaintiff to Corbridge in pursuance of the purchase, and upon his joining the three other defendants in the venture he became bound by all the above agreements.

12. Thereafter the defendants Corbridge and Ward, acting on behalf of the other defendants and of the plaintiff, and in furtherance of the joint venture, obtained in their own names from the said Wessels agreements granting concessions for mining and prospecting over the said farms or portions of them, and on or about October 28, 1887, one of such agreements was entered into between the defendant Ward and the said Wessels, whereby the said Wessels granted to the said Ward the refusal of the purchase of the said farms Oliphantfontein and Benaauwdheidsfontein, with right of prospecting for twelve months.

13. Thereafter the agreement of October 28, 1887, was renewed with certain modifications and additions, and ultimately, on or about December 24, 1891, the said Ward parted with the rights in respect of the said concessions to the De Beers Consolidated Mines upon certain terms and conditions embodied in a written agreement, and the said company have obtained transfer of the farms from the said Wessels into their own name.

14. Large profits far exceeding the sum of £2,500 have been made by defendants out of the said concessions, a valuable diamond-mine styled the Premier Mine having been discovered upon Benaauwdheidsfontein, and the plaintiff contends that all the said concessions from time to time obtained by the said Corbridge, and then by the said Ward, were obtained and held by them subject to the rights of the plaintiff under the agreements in paragraphs 4 and 7 referred to, and that the defendant Ward in obtaining the said concessions in his own name was and remained bound by the terms of the prior agreements with the plaintiff, and that all the defendants remained and are now bound to the plaintiff to carry out the terms of the said agreements.

15. The value of the forty claims in Wesseltion mine upon Speculatie is assessed by plaintiff at the sum of £40,000. And the rights of the plaintiff under the agreement in paragraph 4 set forth in respect of any new mine discovered upon the properties covered by the concessions are valued by him at £100,000.

16. The defendants refuse to recognise the rights of the plaintiff under the said agreements, or to pay him any sum of money whatever.

The plaintiff claims

(a) An order declaring his rights as against the defendants under the agreements in paragraphs 4 and 7 referred to.

(b) That the defendants be ordered to pay him the sum of £2,500, with interest *a tempore mora*.

(c) That the defendants be ordered to give transfer to the plaintiff of the forty claims above referred to in the Weaselton mine upon Speculatie, in terms of agreement B, or to pay the sum of £40,000.

(d) That the defendants be ordered to give transfer to the plaintiff of the said twenty claims in the Premier mine upon Benauwdheidsfontein, in terms of agreement D, or to pay the sum of £100,000.

(e) Such alternate relief as may seem fit.

(f) Costs of suit.

The defendants Ward and Corbridge in their plea admitted paragraphs 1, 6, 9, 13, and 16 of the declaration.

As to paragraphs 2, 3, and 4, they admitted that the concessions, agreements, or contracts marked A, B, and C, had been entered into.

As to paragraphs 5, they admitted that an agreement was entered into on 1st March, 1886, between Eland, Seavill, and Corbridge, and that Corbridge acted for Eland and Seavill as well as for himself in entering into the agreement marked C.

As to paragraphs 7 and 8, they admitted the agreement entered into between the plaintiff and Corbridge in June, 1886.

As to paragraph 10, they said that on the 31st July, 1886, Corbridge executed an agreement with Ward pursuant to previous arrangement, and they further said that Ward on and after the 31st July, 1886, did advance the sums stipulated in the agreement marked G, annexed to the plea, for the prospecting of the Weaselton mine, which did not prove payable, and that Ward never received from Corbridge any cession of one-fourth or any share of Corbridge's concession obtained from the plaintiff.

Save as aforesaid, they denied paragraph 10, they denied paragraph 11, and the defendant Ward specially said that he contracted only as aforesaid, and entered into no agreement relative to the prospecting of the Weaselton mine, other than the aforesaid agreement of the 31st July, 1886.

That the defendant Corbridge obtained from C. H. Wessels extensions of the agreement marked A until the 30th September, 1886, for the prospecting in Speculatie, but the said Wessels refused any further extension, nor did he grant any extension of the agreement marked B for prospecting on Uitzicht, and as no payable mine was found either on Speculatie before the 30th September, 1886, or on Uitzicht before the 13th August, 1886, the said agreements became and were in terms thereof null and void.

As to paragraph 12, they said that in August and October, 1887, respectively, the defendant Ward acting on his own behalf, and not on behalf

of the defendant Corbridge, or any other person, received concessions from the said Wessels (a) allowing the said Ward to prospect, test, and develop a certain mine named Oliphantsfontein, and granting the said Ward the refusal of the purchase of the farms Oliphantsfontein and Benauwdheidsfontein with a right of prospecting for twelve months, but save as aforesaid, they denied the allegations in the said paragraph, specially denying that the defendants other than the defendant Ward had any right, title, or interest in the said concessions so obtained.

As to paragraph 14, they admitted that a valuable mine, styled the Premier mine, had been discovered upon Benauwdheidsfontein, and the defendant Ward admitted that he had made profits exceeding the sum of £2,500 out of the concession obtained by him from Wessels as aforesaid in October, 1887, and the renewals thereof (though not out of the concession to work Oliphantsfontein, which proved valueless), but the defendant Corbridge denied that he had made any such profits as alleged, or that any profits had been made by him or any other person to his knowledge out of the concessions relating to Speculatie and Uitzicht, and dated the 18th August, 1885, which he alleged had become, and were as aforesaid null and void.

Save as aforesaid they denied all the allegations in the said paragraph, they denied all the allegations in paragraph 15, the defendant Corbridge saying specially that the Weaselton mine never had proved to be a payable mine, and that all operations in connection therewith, under the concessions from Wessels, now null and void as aforesaid, had resulted in loss. Therefore the defendants prayed that the plaintiff's claim might be dismissed with costs.

The defendants Eland and Seavill in their plea admitted paragraphs 1, 2, 3, 6, and 16 of the declaration; they admitted that the plaintiff entered into the agreement marked C with the defendant Corbridge; but they denied that in entering into the said agreement Corbridge did so on behalf of the defendants Eland and Seavill, or that they were bound by the terms thereof.

They admitted that in March, 1886, an agreement was entered into between Corbridge and the defendants Eland and Seavill whereby the latter were to share with Corbridge in his interest in the plaintiff's concession, and that Corbridge was to have sole control of all the negotiations and matters connected therewith, but they said that it was expressly agreed that they should not be liable for any expenses connected with the development of the concession. They denied the allegations in paragraphs 7 and 8, and said that the agreement D, and the supplementary agreement to D annexed to the declaration, did not contain the allegations set out in these paragraphs.

They denied the allegations in paragraph 9, and said that any cession made by the plaintiff Contat to Corbridge had no reference and was not in any way connected with the agreement entered into between the defendants Corbridge, Eland, and Seavill, to which the said Contat was no party, and in which he had no interest.

They admitted paragraph 10, but said the share was never ceded; they denied any knowledge of the allegations in paragraph 11, and said that whatever venture they entered upon the plaintiff was no party thereto and was not interested therein. They denied paragraphs 11 and 12, and as to paragraph 18 they said they had no knowledge of the allegations therein, and said further that the concession granted to the plaintiff never extended to any portion of the farm Benauidheidsfontein, upon which the Premier mine is situated.

As to paragraph 15, they said that the said claims were valueless, and that no new mine had been discovered upon the properties covered by original concessions granted to the plaintiff, which concessions had lapsed by effluxion of time.

Wherefore they prayed that the plaintiff's claim might be dismissed with costs.

Issue was joined on these pleadings.

Mr. Forster opened at considerable length for the plaintiffs, and called

Joseph Contat, who stated (being examined by Mr. Guerin) that he was a diamond-mine explorer, living at Kimberley. In August, 1885, he had obtained certain concessions from Weasels, as set out in his pleadings. He started working on the Wesselson mine, the Little mine, not the Premier. He sank shafts, put up machinery, and worked generally. He found diamonds, and reported the fact. He then prospected to find the extent of the mine. Regulations were drawn up, the mine surveyed, and claims allotted. Notice was put in the papers that he had charge of the mine, and about 200 claims were given out. Seavill helped to draw up the regulations. Soon after Eland & Seavill introduced Corbridge to him as a capitalist. This was the first time he met him. He met Ward just before allotting claims; he had known him since 1878. Ward asked him to sell his concession, but he refused, offering a share if Ward would put up good gear. He was short of money, and had no funds to work with. He gave Corbridge a right to develop, but found he was merely a man of straw. This was early in March, 1886. The mine was continually worked up to that time. Corbridge was working unsatisfactorily, and he told his brokers (Seavill & Eland) that he would not renew his rights after two months. He met Ward at Corbridge's café, the Fountain Café, in April, 1886. Ward was paying the workmen, and he told him (Ward) he did not know he had anything to do

with the mine. Ward said he must not be annoyed because he paid the men. Corbridge asked for a renewal, and believing Ward was in with him he granted it. For this he received £20. The agreement of April 28 was signed at Seavill's or Rhodes's office. Seavill drew it up. Corbridge raised some objection to it. Mr. Attorney Rhodes was acting for them all. When disputes arose he went to Hull. He had a conversation at the latter's office in June. Eland came in and said they had better work without attorneys. Then he met Eland and Seavill at Rhodes's office, but Ward was not there; they appeared satisfied with the richness of the mine. He signed the document annexed to the plea. Ward was then managing the mine, appointed he supposed by Corbridge. The cession of the rights was executed at Rhodes's office on July 6. Corbridge represented them all, he signed one document and witness another. They said Ward could not raise money then, but if he could get a cession he would carry out a larger scheme. They all mentioned his name. Witness was to get a share, and Ward was to manage. Ward was all along said to be a partner. They were the four partners, but Ward alone had any money. About three months after this another agreement was drawn up. He was asked to be a partner, but refused. This might have been in November. He preferred standing by his agreement. He saw the proposed agreement first in the Fountain Café. He took a copy to Rhodes, who explained that it would make him a partner, only to get a fifth share. He refused to sign this, Corbridge just after said he would break his agreement if he did not sign. Corbridge said he, Eland, Seavill, and Ward were partners, and wanted him to join. He (Corbridge) turned witness out of the Café. Rhodes then sent him to Houlgrave, who wrote to Ward demanding the cession back. He then saw Ward at his house, and explained that Corbridge was not carrying out his agreement. Ward told him to take no notice. He did not get the concession back. It was then decided to start the Tafelkop Diamond-mining Company. He was away for some time about that business. He gave instructions to Houlgrave to write to Ward. Ward answered. The letters were lost, but he had copies; they were among the Tafelkop papers. He swore he could not find them. He could not tell why Ward did not address Houlgrave instead of himself. Welch saw these letters in February, 1887, and Nenna took charge of them. Nenna was secretary to the Tafelkop Company. The office was in witness's private house. He was arrested in February, 1888, for contravention of the Diamond Trade Act. He was sentenced to five years' imprisonment, and £1,000 fine. The fine was paid.

In 1888 he told Nenna to put an advertisement in the paper stating his rights to the mine. Beet was his agent, and he instructed him to watch his interests. Eland and Seavill came to see him at Robben Island. He told them he was not a partner, and would have nothing to do with suing Ward and Corbridge, which they wanted to do. When released in March, 1892, he wrote to Rhodes demanding the return of the cession. He considered the Little mine as valuable as the Premier.

Cross-examined by Mr. Solomon, Q.C.: Coghlan had never shown him any copies of the letters. He did not think he told Coghlan he had never received a letter from Ward. Witness said he would write to Beet, and tell him to co-operate with him. He was suspicious at the time. He did not, when travelling down to attend this case, tell Mr. Wessels, at Victoria-road Station, that he had no claim against Ward; that his claim was against Corbridge. He had spent between £600 and £700 on the mine before he gave the concession to Corbridge. He told Mr. Cornelius Wessels that the mine was payable. Corbridge was the means of having him trapped in 1888 when he was about to float a company with my forty claims. The concession would not have been obtained from Wessels if it had not been for him. He was to get twenty claims in any mine which might be discovered, either Speculatie or Uitzicht. He heard Ward had got a concession from Wessels, but he had nothing to do with Wessels. He put in the advertisement because he wanted another document, and could not get it. Before that he asked Rhodes for all the papers relating to the concession, but never got them. He had signed a receipt for certain documents. The cession was not among them. The advertisement was based on these papers. He knew nothing about further notices by Wessels and Ward. He told Welch he would recognise his rights. The Premier mine was discovered while he was in prison. Welch never purchased a share. He had no letter from him. He took no further steps until 1891. Beet looked after his interests generally, but he had no original papers or documents, he obtained his information from Seavill. He rested his claim on the deed of sale. He saw Ward at his house in Beaconsfield.

Cross-examined by Mr. Juta: He never mentioned Corbridge to Seavill and Eland. He looked to Ward only, and said he would stand by his deed of sale. This is with Corbridge, but he represented the lot. He did not tell them he looked to them alone. Ward said in 1886 that he had a big scheme on. He was to get a *pro rata* share. This was all arranged with Ward privately. Seavill and Eland never spoke much about it, but he may have mentioned this scheme to them. He did

not tell them about the agreement with Ward. He might have got as much by his agreement as by his one-fifth share. The whole mine was worth about £150,000; there are eighty good claims in it. He had never made a special cession of Uitzicht. None of his witnesses had any interest in the result of this case. Welch was not to have any share.

In reply to the Court, witness stated that Corbridge signed the document, and he kept it on the same day the cession was made. On 15th November a proposal as to partnership was made, and refused by him. He tried to get back his concession, thinking it all at an end, but as they would not give it back he thought it still binding. If the cession had been given back he would probably have made a new arrangement. The agreement came to an end in 1890, but he thought the others could negotiate to continue it. He thought Ward represented him. No papers reached him at Robben Island. He knew nothing of Ward and Wessels' agreement. In 1887 he knew Ward had got a concession. He would swear the copies put in were substantially correct copies of letters received by him from Ward, and signed by Ward.

Joseph Contat, recalled by the Court, stated that at the time of his first agreement with Corbridge on March 1, 1886, he did not know that Ward had any interest. Eland and Seavill were merely his brokers. First knew of Ward's interest in April. First knew Eland and Seavill had an interest when Hull closed his sale in 1886. When the cession was made in July, 1886, he knew Ward, Eland, and Seavill were interested. The cession was made to Corbridge, as he represented the lot. The cession was of rights from Wessels direct, not under the agreement with Rossouw. They never asked for the latter, but he was prepared to give it. Only after the cession he began to suspect Corbridge, finding he was a man of straw, but as he knew Ward was supplying the funds he let them go on.

Mr. Forster here applied for leave to amend the declaration by inserting a prayer based on the alleged trust between Corbridge and Contat. Corbridge having taken the concession, held it on trust, and was bound to protect Contat's interest; so also Ward was bound.

Mr. Solomon objected. It was sought now to claim merely from one defendant in a matter where four were joined.

The Court refused to allow the amendment.

Mr. Forster stated he would press his claim for twenty claims in the Premier mine, though it had been withdrawn yesterday.

The Chief Justice said he did not think counsel should be held too closely to hasty withdrawals, and the claim would stand as originally.

Mr. Forster called

Thomas Welch, who deposed he had been a

digger for twelve years. He was engaged by Corbridge to prospect the Little mine in April, 1886. He went out and found that only a few small holes had been dug. He sunk one shaft to 37 feet, and found very well, but was stopped by water. It was a payable mine. There would be 200 claims with the floating reef. This went through the centre of the mine. There were about 100 payable claims. Corbridge told him to let no one know of the mine, especially Contat and Wessels. He was to keep it dark, as Contat had a large interest which could not be got out of him if he knew of the finds. He found a $1\frac{1}{2}$ carat stone, valued at £10. Corbridge saw it. This was about May, 1886. Ward had been out several times. He said he had no share, and that the ground looked well. Ward paid the men weekly at the Fountain Café. Corbridge told witness that Ward was finding the money. The defendants often met at the café. They said it was payable, and witness was afterwards guaranteed ten claims in the mine. It is still payable. Corbridge spoke about Ward coming into the concern early in July. He had recommended Ward. Ward said he had bought a share, but witness's ten claims would not be interfered with. Ward now gave directions, and witness got machinery from his works. He was not satisfied with Corbridge up to this. He told witness he had a motive in keeping the mine back, as he wanted a further concession. He was hard up in August, and a bill was given in his favour endorsed by Ward. Ward said the security was ample, viz., the ten claims Corbridge inserted in the last clause in the deed hypothecating these claims. He made an affidavit of finding thirteen rough diamonds. Corbridge got the certificate. He merely gave him the diamonds from a bottle where they were kept. He used to take a few out a month to register them. He afterwards exhibited fourteen diamonds. More were found and put in the bottle. In 1886 Corbridge and Ward came out. Corbridge got hold of the bottle of diamonds and galloped off with them, Ward following. The work was unsatisfactory, and he went to Mr. C. Wessels and made an affidavit, in which he declared the mine payable at thirty feet. It was not payable on the surface. All the four defendants were partners. He left, and returned in February, 1888. He then heard the concession had been changed. Corbridge said it would make no difference; that Ward was able to work the mine and stump up the money. He said to them that there was some underhand work going on. Ward said his (witness's) interest was only in the small mine, and that he had paid £10,000 for his concessions. Contat showed him two letters. They were in Ward's handwriting. He knew it well. The copies put in are correct. He put them back in the

pigeon-hole. It was said he had "salted" the mine. He met Seavill in 1888. He entered into negotiations with Ward's manager, Ramsey, with regard to flotation. Ward asked £100,000 for the Little mine and £800,000 for the estate. The Premier mine was known ten months before it was opened, but kept back. He saw Ward in February, 1891, when he said the partnership had lapsed, but he would still give him (witness) something. He replied that he only wanted what was due. Corbridge said he had advised Ward to settle. Eland and Seavill took proceedings against Ward. He had overheard a conversation between Coghlan and Rhodes. Rhodes wanted to get hold of all Contat's papers and have them destroyed, but Seavill objected. Seavill wanted witness to go to Robben Island and buy Contat's interest.

Cross-examined by Mr. Solomon: He had lost his case at Kimberley. He was determined to assist Contat to the bitter end. His occupation now was to expose this swindle. He had no interest in the case, nor in the claim of Contat upon Ward. He remembered writing to Contat, saying, "As you ceded half your rights to me." There was an agreement in 1888. His documents were all lost between Natal and Port Elizabeth. He only claimed his 10 per cent. and ten claims which Contat would recognise. When he wrote he thought he had a half-interest. He never told Rhodes he was a partner, nor said he was working up his case. He saw the documents at Contat's house in 1888. He had nothing to do with Contat in business matters. He saw some of the documents in Seavill's office, and in 1886 saw the concession of Wessels to Contat. He did not read it, and never saw the clause about the mines being payable. He was never asked about the letters of Ward. He knew what Contat had to get, but never read the agreement. He had nothing to do with Ward and the others. Contat worked the mine in another part. It was not payable at the surface. He washed a few hundred loads, perhaps 1,000. He had to wash a lot of rubbish. He had no idea how many diamonds they found, or what their weight was. He wanted to satisfy Wessels that it was a payable mine, because he wished to work it. He kept no register. Corbridge had to disclose the diamonds, and he was under his hands. He never signed the affidavit alleging that seventeen diamonds were found. Ward came out often in 1886. He was a confidant of Corbridge, and Corbridge told him of the partnership before July. He was certain it was in July.

Cross-examined by Mr. Juta: He did not produce the letters of Ward in his case, because he was not asked to.

Re-examined: Mr. Nenna was subpoenaed in that case.

Frank Augustus Nenna, in reply to Mr. Guerin, stated that he was a journalist at Kimberley. He was secretary to the Tafelkop Company, and his office was in Contat's house. On his arrest he took charge of his effects, and among them were two letters from Ward. He was not very well acquainted with Ward's writing, but was almost certain these letters were his. He packed up Contat's things and put these letters away separately, as they appeared to refer to Tafelkop. He showed them in Coghlan's office. C. Coghlan saw them. They were copied in his presence; not press copies, but ordinary copies. The originals were given back and put into an iron box, which was lodged in the strong-room of a friend of his, Mr. De Muller. He intended to show them to Welch, but was interrupted. He put them away about May or June, 1891. He made search for them soon afterwards. He went with Welch. The door had been forced open, the large box carried out, and the iron box abstracted. Search in the box was made in Duncan's office. There were several valuables in the box besides the letters. The box had clearly been forced. He handed the documents to Coghlan, because Seavill and Eland asked for them for the purposes of their case. He refused them often. In February, 1888, Contat and Ward spoke about salting. Ward told him (Contat) to keep still about his rights and no one would do him out of them. He saw Ward again in 1890, and Ward spoke about Oliphantsfontein. He asked if Contat would put obstacles in his way. Witness said he couldn't, and he would try and help if Ward would do something for Contat's child. He saw Ward again in July, 1891. He said a letter had been written to the Breakwater. He hinted that some arrangement would be made. He asked Ward to arrange for the child, and mentioned the letters when Ward told him to see his attorney. He saw Rhodes, and he said he would like to see the letters, and if they were as important as alleged he would see what could be done for the child. He discovered the loss in December, 1891. He did not wish to part with the letters without counsel's opinion. He was subpoenaed in Welch's case, and believed the letters were in his possession then.

Cross-examined by Mr. Solomon: He first saw the letters in December, 1887. They were put in his box in July, 1888. He read them again about April, 1891. He made that affidavit as he wished to find out if anything could be done for Contat's child. He gave a list of documents to Seavill. The copies were not made in his presence. In August, 1891, the letters were still in his box. They were taken to Coghlan's office about May, 1891. He could not swear that the Mr. Coghlan present had seen the letters. He refused to have them destroyed. He spoke about £300 for the

child. He took the originals to Coghlan's. He made pencil copies once. The subpoena in Welch's case was early in December, 1890. He had been specially requested to go to Rhodes. Ward usually signed "Henry A. Ward"; these are "H. A. Ward."

Mr. Solomon requested that Mr. Nenna might be recalled, and in reply to him witness stated that he took the original letters written by Ward to Coghlan's office. He did not first make copies and take them to the office. The copies now put into his hands he had made at Coghlan's office, and were taken from Coghlan's copies. He left them in Coghlan's office, as he wanted them certified by someone in the office. If Coghlan said he brought these copies there he would swear Coghlan was wrong. He could not say why he put "H.A.W." at the end. He could not fix the date of this; it was probably about July, 1891. He had seen a copy of the letters which differed materially from these, and wished to verify it. He believed that copy was shown to him by Eland, but he told him it was incorrect. He thought it improbable that Coghlan could have taken these copies to Robben Island in May, 1891; it was possible though.

By the Court: He showed the originals to Charles Coghlan; he saw them. He never showed them to Rhodes, nor, he thought, to Seavill. He first saw these letters in December, 1887. He found them in some pigeon-holes used by Contat, and put them with the Tafelkop papers. He felt satisfied that they were Ward's writing.

Mr. Forster called Mr. Easton Brown, who stated that he was an attorney in the office of Duncan at Kimberley. In Welch's case Duncan was his attorney. He went to Coghlan's office to get some documents, and got his papers in Eland and Seavill v. Ward. Amongst them were copies of the letters dated 15th and 28th November, 1887. His clerk copied them, and he compared the copies; those put in were correct.

By the Court: The copies these are from were made by one of Coghlan's clerks. His impression was they were taken from a press copy. The papers were given voluntarily. He also received statements made by Ward and Seavill, and went over Seavill's statement with him, but not Eland's. Seavill confirmed his. The original statements were handed back, and these copies were correct.

Neither Mr. Solomon nor Mr. Juta cross-examined.

Mr. Forster put in an agreement between Ward and De Beers Mining Company and closed his case.

Joseph Contat was recalled by the Court, and stated that at the time of the session on July 6 he looked to Ward mostly. Ward was the only man he could rely upon; he looked to Ward alone; he looked to the four but specially to Ward; the

four were partners. Corbridge said he represented the four, or otherwise he would not have given the occasion. Rhodes was still his attorney in July, 1886. He showed Ward's letters to Welch in the presence of Nenna. He did not think he showed them to Rhodes. They came by post, and to the best of his belief they were in Ward's handwriting. He spoke to him about them in February, 1888, and he did not deny having written them. He first mentioned them to Welch. He left them all in Nenna's care. Rhodes was in the room on the day of the session. He could not say when. Corbridge said he was acting for all. Rhodes was his attorney up to February, 1888.

Mr. Juta asked for absolution from the instance with regard to his clients (Seavill and Eland). Contat gave credit to Ward only. There was no evidence against Eland and Seavill, and there was no credit given them in July. All the letters were addressed to Ward, and it was clear Contat looked to him only.

The Court refused to grant absolution from the instance.

Mr. James Joseph Coghlan, senior partner of the firm of Coghlan & Coghlan, attorneys, of Kimberley, deposed that in March, 1891, he was acting for Eland and Seavill. He received from Mr. Seavill copies of the two letters, dated 15th and 28th November, purporting to have been written by Ward to Contat. He (witness) had never seen the originals. He contradicted Nenna, who swore that he had made copies of the letters in his (witness's) office. Witness tried to trace the originals in his office, but could not find them. At the end of April, 1891, witness with his clients came down to Cape Town. He saw Contat on Robben Island. Copies of the alleged letters were read over to Contat, but the latter denied that he had received any correspondence from Ward, and said that he looked to Corbridge for his £2,500 and forty claims in the Wesselton mine. Contat at this interview signed a letter authorising witness to inspect all documents belonging to Contat in Beet's possession. Contat was wrong in saying that he (witness) had stated that he had seen the originals of the letters of the 15th and 28th November. Witness had never seen them. Nenna did not give him (witness) the original letters, but he offered to send them in a registered letter for a consideration.

By Mr. Juta: At the interview on Robben Island Contat said that Corbridge owed him £2,500 and forty claims in the Wesselton mine. In Welch's case nothing was said about the letters of the 15th and 28th November.

Cross-examined: Mr. Nenna offered for a consideration to post me the original letters in a registered letter. I told him that I did not want the originals. Nenna said that he wanted the money for producing the original letters for Contat's

child. I never said that the production of these letters would destroy the chain of evidence. My brother has not seen the originals. At the interview on Robben Island Contat looked suspicious, his statement was of no use to us. I first heard of letters in April, 1891.

By the Court: Nenna would not give up the original letters without a consideration, which he said he wanted for Contat's child.

Mr. Rhodes, attorney-at-law, practising at Kimberley, deposed that up to 1888 he acted for Contat. He could not remember when he first acted as attorney for Ward. Ward first saw witness about the Wesselton concession about the end of 1887. Witness acted for Contat in the matter of the transfer of Contat's concession to Corbridge. Witness might have been present at the meeting of the 28th April, 1886. Ward's name was never mentioned and could not have been, as he had nothing whatever to do with the transfer of the concession. It was only in October, 1887, that Ward first saw witness about the concession over the farms Oliphantsfontein and Benaauwheidsfontein. Witness never told Contat that Ward was the fifth partner. Witness never had in his possession the letters of the 15th and 28th November, purporting to come from Ward to Contat. Contat came to him in February, 1888, for certain documents for which Contat gave a receipt. Witness knew Nenna and remembered having three interviews with him regarding certain documents which Nenna said he had in his possession relating to the Wesselton mine, and which he said Eland and Seavill were anxious to obtain. Witness told Nenna that he knew what the papers were, as they had been in his possession, and that they were not of much account, but if the documents were shown to him he would consult with Mr. Ward. Nenna said that they were scattered about and that it would take two or three days to get them together. On the second occasion on which he saw Nenna, the latter specially mentioned two letters which he said he had in his possession, dated the 15th and 28th November, and which were of considerable importance to Ward; for the production of these letters Nenna wanted £200 or £300. Witness begged Nenna to allow him to see the letters but the latter refused to do so. The third occasion on which he saw Nenna was on the 10th December, 1891, when witness had gone to see a man in Kimberley who was reported to have the letters. He met Nenna at this man's house, spoke to him about the letters, but Nenna declined to produce them.

Cross-examined: Witness knew nothing about the letters. At Nenna's second visit special reference was made to the letters, and £200 or £300 asked for their production.

By the Court: He did not tell Ward on this occasion that Nenna had important and compromising letters in his possession purporting to have been written by Ward to Contat. He did not know that Ward saw Nenna in his office with reference to the letters. No such interview took place in his presence.

Cross-examination continued: Witness knew something about the Little mine. He had lent money to Eland and Seavill. The £500 to be paid to Contat was found by witness.

Henry Alfred Ward deposed that he first knew Contat in 1878. Witness remembered seeing him again in 1886, when he had obtained the concession from Wessels. Contat asked him to join in working the concession, but he refused. In July, 1886, he promised to advance Corbridge £200 to prospect the Little mine. He did advance this money in August and September following. He first heard of Oliphantsfontein from Pauling, whom he met in Cape Town. Witness went to see Philip Wessels, son of J. J. Wessels, and learned from him that Corbridge had already applied for the mine. Subsequently he acquired Corbridge's rights, and prospected and worked fifty claims in the Oliphantsfontein mine, on which he lost £4,000. In October, 1887, the larger concession was granted, for which witness paid £10,000—£5,000 cash and promissory notes for the balance. Witness could not meet the promissory notes on maturity, and was obliged to sell a quarter-share of the concession to Lawrence and a quarter to Colonel. In December, 1890, the Premier mine was discovered.

By the Court: He had made more than £2,500 out of the Premier mine. He never wrote the letters of the 16th and 28th November, and knew nothing about them.

Cross-examined: He had had considerable litigation with reference to his concessions; first with Eland and Seavill, then with Armstrong, and afterwards with Colonel. He only saw fourteen diamonds from the Wesselson mine. There was no work after the 80th September, 1886. He had several schemes of flotation in hand in 1888; Seavill helped him. Fenton drew up his prospectus. He did not recollect ever seeing it. He might have seen it. Many of the cancelled documents he had never seen. He never pointed out to Seavill that there was a gross error in the prospectus. The statement in the prospectus was merely a generality. The prospectus No. 88 was drawn up on the 4th of March, 1889, by Seavill. It was sent to London. It was really only a memorandum. It was true as far as he knew, but not the statement that the mine would pay from the surface down. The letter of August 1, 1889, was written by Murray at his direction. (The letter says forty-two diamonds had been found.) Lyons wrote this out, and he

signed it. It was sent to Lyons and Stone. The object was to float a company. He only saw fourteen diamonds, but heard of the rest, and believed it true. The indications of a mine are nothing; almost all have the same indication. He saw Nenna once, when Nenna told him he had those letters. He said he (witness) never remembered writing to Contat at the Breakwater. He did not meet Eland, Seavill, and Corbridge at the Café on the 1st July, 1886. He never met them previous to signing that document on July 31. He lived in Beaconsfield at the time, and in 1888 was at Du Toit's Pan. He was sometimes at the Café. He had not found the money before 31st July, 1886. There was a tramway on Little mine, also on Oliphantsfontein. He took Mr. Barnato to the latter in 1887, and pointed out the Little mine also. The place had been worked in a disgraceful manner. He sent out a machine. He did not remember meeting Corbridge, Eland, and Seavill at Eland's office about a £50 note. It was not agreed that each should pay a *pro rata* share. He did not tell them he would put more money in and develop it. He had nothing to do with Contat, and never had a conversation with him. Nenna and Welch were lying in relating a conversation between him and Contat. He never knew Nenna, and had nothing to do with Contat at all. He never accused Welch of "salting" the stuff. He never was shown a diamond by Welch, and that famous "jumping" case was a pure fabrication.

Re-examined by Mr. Solomon: He only tried to flee after he had got the property into his own hands. Eland was merely his agent. He settled his case with Eland and Seavill because he could do nothing while it was hanging on. He never disputed Armstrong's right. He lived at Du Toit's Pan at the end of 1886, and then went to Beaconsfield, and had lived in the same house ever since. He had no office in Du Toit's Pan.

By the Court: He had paid Eland and Seavill part of the £5,000. Corbridge might get something, though he could not claim it by right. He first made the acquaintance of Wessels in 1887. He then had an agreement with Corbridge, and had advanced £200. Wessels refused to treat until he had got Corbridge's rights. He knew of the correspondence between Corbridge and Wessels afterwards. Corbridge only worked at the Little mine. Under the agreement of July 31 witness had only to advance money. He had no control. It was his property at the time the prospectus was drawn up. He had the whole concession then. He considered the agreement at an end when they stopped work. The Premier mine paid 8s. 6d. per load, or 1s. 6d. net.

Philip Barend Wessels, examined by Mr. Schreiner, stated that he was the son of the late J. J. Wessels, and lived at Rooifontein

Speculatie and Uitzigt were beaconned off. He was managing affairs there, and made arrangements for prospecting. Oliphantfontein mine is on Speculatie. It had been worked by a company before 1886, and in that year Croxford was still working some claims which he got from C. Wessels. Contat got his concession then from C. Wessels; witness knew of it. The Little mine was known to be a mine then, and there were some workings on Speculatie. In 1886 he heard Contat say he had large estates in France, and was going to work thoroughly. He never saw Contat at work, and he never declared any diamonds to him. Welch worked better. Up to 18th August, 1886 he only saw one small diamond. The mine was never declared payable to him by Welch, and he was there to May, 1890. He knew Corbridge, and so did Russouw. At the time of extending his concessions he never heard Ward's name in connection with them. If he had known Contat was connected with them he would never have granted the extension. When Corbridge got the extension negotiations were pending under a separate agreement. He received a letter from Corbridge on 11th August, 1886. Haarhoff drew up a draft agreement, but all negotiations dropped through before 30th September, 1886. He never heard of Ward up to this time in connection with the matter. He never gave him an extension of rights under Contat's concession. Croxford left off digging in September, 1887, and Corbridge approached witness to get rights to prospect Oliphantfontein. Uitzigt rights were never ceded. Russouw managed Uitzigt. Between 30th September and the time Corbridge approached him he never heard anything of Ward. Contat never came to him after that time. He did not come to any written agreement with Corbridge, the negotiation being verbal. He first saw Ward about prospecting in 1887, shortly before the correspondence. He spoke about Corbridge and Oliphantfontein and did not know if Ward had been prospecting. He did not consider himself bound to Corbridge, but did not care to drop him altogether. Corbridge's transfer had nothing to do with Contat's concession. He did not give Corbridge rights because of Contat's concession. He thought there was nothing in Oliphantfontein; they had gone 75 or 100 feet deep. He thought the Oliphantfontein agreement was extended for six months. He found one diamond on the farm and handed it to Ward. Barnato came out by appointment, and proposals were made. Eland, Seavill, and Corbridge had nothing to do with the proposals. Ward had negotiations with him, but he (witness) did not complete Ward's contract. The Premier mine was discovered afterwards. He knew nothing of the transfer to De Beers. The Little mine has never been proved payable; the Wessels family have no interest now.

Cross-examined by Mr. Forster: He knew nothing about digging; there might be other payable mines on the property. Ward paid the £10,000 under the agreement of October, 1887, by £5,000 cash and the rest in instalments. He went to America in May, 1889. He saw Contat, but did not know he had had the mine surveyed. Haarhoff acted for him at Kimberley, and Marais at Boshof. Corbridge came out to see him frequently; he did not know he was insolvent. His two brothers were justices of the peace; he was not. He only knew of one diamond found in the Little mine. On 30th of September he saw Corbridge, and told him that as he had not worked the concession was at an end.

William Isaac Corbridge, examined by Mr. Schreiner, stated that he resided at Kimberley. He knew Contat in 1886, but knew nothing of his concession until February, 1886. He then heard of it from Seavill. Two agreements were entered into in March; one between him and Contat, the other between Eland, Seavill, and himself. Contat was not aware of the second. Welch was sent out by him. He financed the matter, using first his own, and then Eland's money. Rhodes was Contat's attorney. He got a promise of £500 from Rhodes, but it was eventually not needed. There was an extension of the arrangement for a month. Ward was not at their backs. The agreement relating to payment of £2,500 was in Ward's office. On the 6th of July the concession was executed; he had difficulties in working. Ward had not been finding the means. He registered some diamonds at Boshof. He saw Ward just before July 31. He then asked Ward to take part, but Ward put him off. Ward did not advance any money before July 31. The syndicate had an arrangement by which anybody could come in. The money was needed to pay the men. In 1886 Ward was well off, and after the agreement he advanced £200. He never gave him a formal concession. He got an extension from Wessels. He never kept anything dark. The bottle of diamonds was a pure fiction. He only got fourteen from Welch. There were no others found. The largest weighed three-quarters of a carat. He approached Wessels for an extension. Coghlan did the business for him. Ward had nothing to do with the negotiations; he was not even consulted. He did not succeed in carrying out the agreement, and negotiations dropped after 30th September. Contat was living at his cell, but this agreement terminated just after November 7. He told him to leave and take his concession. He never took legal proceedings against him (witness). The negotiations in 1886 about Oliphantfontein were not known to Eland, Seavill, or Ward. He could not get it unless he got someone to find money. Eland said he had someone, and on witness giving up

rights said it was Ward. He negotiated with Ward, and it was talked over. No actual agreement was come to. He had no contract with Wessels about Oliphantfontein. Ward did not consult him about the concessions. He claimed no right under them, as he did not contribute anything. Ward had nothing to do with it on the 6th of July, and no one said he had.

William Isaac Corbridge, cross-examined by Mr. Foster: When he obtained the concession he had some capital, about £150. In 1886 the partnership with Jeffreys in the Fountain Outé was dissolved. At that time he owed Widd money. At the end of July his money was run out, and Ward was taken in. In May, Eland, Seavill, and himself did not consider the mine a failure. There were prospects of its turning out well. He did not ask Seavill to write to Wessels telling him that the mine was payable. No attempt was made to keep Wessels or anyone else in the dark. The mine had never been payable. Meetings were held at the café, but they were more usually held at Eland's office. He could not say that he told his partners not to part with their shares. He could not say whether Eland and Seavill considered the mine payable. He thought Contat's concession was too limited, and was anxious to have it enlarged. Prospecting was stopped on the 30th September. He objected to sign the document prepared by Seavill reporting that the mine was payable. He never was a partner in Ward's concession, but he considered himself entitled to something from Ward. He did not know what Ward was at present making. Ten shares were given to Welch, but he was not to sell them without the consent of witness. On the promissory note for £50, all four were equally liable. Contat had nothing whatever to do with Oliphantfontein. Witness remembered meeting Seavill on one occasion and telling him that they had no legal claim on Ward. Atkinson was employed for two days, at 10s. a day, to watch what offices Contat entered. Witness never told Nenna, after Contat's conviction, that it was just as well that Contat had been provided for for five years.

By the Court: The contract with Contat came to an end on the 30th September, although on the 15th November he was offered a fifth share in the new venture.

Mr. P. H. Marais deposed that he was a son-in-law of the late Mr. J. J. Wessels, and acted as his agent from February, 1889. Prospecting was first carried on on the Little mine in 1871, but that mine and Oliphantfontein would not pay for working. He had had considerable experience as a digger.

Mr. Ruseow corroborated the evidence of the last witness.

Mr. Cecil Elliot Seavill stated that he received

the copies of the letters of the 15th and 28th November from Nenna, but the latter refused to produce the originals. Witness corroborated the evidence of Mr. Coghlan with regard to their interview with Contat on Robben Island. Witness gave explanations of his evidence given in Welch's case. The letter of 14th October, 1886, was not sent to Mr. P. B. Wessels, although it was written by witness at Corbridge's request. Witness found no part of the £200. Ward had no knowledge of the agreement of the 25th May, 1886.

Cross-examined: Witness believed that Nenna did tell him that he would show him the original letters if he (witness) obtained an order from Contat.

By the Court: Ward was never present at any of their interviews. Contat was to get a share in the new concession on condition of his waiving his right to his forty claims.

Mr. F. A. Nenna (recalled) stated that his box was broken into on the 22nd December, 1891. Witness lost several valuables besides the original letters. He did not give immediate information to the police, because he suspected the man who had broken open the box and attempted to follow him up.

Mr. Forster proceeded to argue the case for the plaintiff, when the Court recalled

Joseph Contat, who stated that in 1886 and 1887 people came to see him about his claim stands. He heard of the agreements of August and October of Ward with Wessels. The first time that Ward told him he was in the concern was in April, 1886.

Robert Walter Hearle (called by Mr. Forster) stated that he was an attorney at Kimberley, acting for the plaintiff. He had a conversation with C. Coghlan about this case. Coghlan is attorney for the two defendants Eland and Seavill. He understood from C. Coghlan that he had seen the originals of the two letters. When interviewed again, he said his mind was a perfect blank, and he could not remember whether he had seen the originals. He told him (Coghlan) that he had told Brown (Duncan's clerk) that he had seen them. Then Coghlan said, "If I did tell Brown so, then I am not prepared to contradict it."

Cross-examined by Mr. Solomon: He wrote to Rhodes asking delivery of the originals, because Nenna told him the other side had bought these letters, that Corbridge had bought them. Nenna led him to believe that Dumoulin was the thief, and that he had sold them to Corbridge. Contat was confronted with Ward, and still asserted that he had spoken to him about the partnership. He said he went to Du Toit's Pan to see him. Ward stated that must be untrue, because he was living at Beaconsfield at the time mentioned. The letters must refer to Tafelkop. They must have been forged in connection with that affair.

Charles Coghlan (examined by Mr. Solomon) stated that he was an attorney, in partnership with J. J. Coghlan. He remembered the case of Eland and Seavill v. Ward; his brother conducted it. He knew Nenna, and had an interview with him on the 10th March. The same day as the affidavit was sworn Welch, Eland, and Nenna were present together. He drew the affidavit about certain documents. Nenna never showed him the letters, nor copies of them. Nenna said he did not want anything for himself, but wanted Contat's boy provided for. That was the only interview he had with Nenna, and Nenna took all the documents away with him. He never had copies made. He saw Hearle, but told him he could not have said anything about the letters to Brown. He told Brown he could give no evidence concerning them. All documents were given over to Welch's attorney for the case of Welch v. Ward.

Cross-examined by Mr. Foster: He believed Brown got copies of these letters at their office. He told Hearle he could not remember the actual documents produced. They had copies before Brown came, but he did not know where they got them.

Mr. Forster was heard on behalf of the plaintiff.

Mr. Solomon, Q.C., argued on behalf of defendants Ward and Corbridge.

Mr. Juta (for Seavill and Eland) was not called upon.

The Chief Justice, in delivering judgment, said that it was clear Ward could not be held liable in this action. Contat must have been mistaken when he stated that Ward had spoken to him about the concession before July 6, as it was perfectly clear that Ward had nothing to do with the concession until the 31st July. As to the others, it was not shown that Corbridge was to receive any advantage from the concession. Contat's publication of the advertisement was the strongest evidence that he considered the agreement of 6th July at an end. In it he stated that his position was that of holding sole prospecting rights over the farm. He evidently considered the cession to Corbridge, Eland, and Seavill had fallen through. Corbridge's conduct in turning Contat out of his café helped to support this belief that the agreement was considered at an end. Then again Contat said he looked solely to Ward, and that no credit was given to the others, and only corrected himself when the force of his answer was pointed out to him. It was not necessary now to go into the question of the authenticity of the letters. Judgment would be for the defendants with costs.

Mr. Justice Buchanan and Mr. Justice Upington concurred.

[Attorneys for the Plaintiff, Messrs. Fairbridge & Arderne; Attorneys for the Defendants Ward

and Corbridge, Messrs. Tredgold, McIntyre & Bisset; Attorneys for the Defendants, Eland and Seavill, Messrs. C. & J. Buissanerie.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, (K.C.M.G. (Chief Justice), Mr. 1892
Justice BUCHANAN, and Mr. 17th Aug.
Justice UPINGTON, K.C.M.G.)]

BEED V. THE DE BEERS CONSOLIDATED MINES, LIMITED.

Diamond mine—Water—Diligence.

There is no obligation upon one claimholder in a diamond mine, worked in the open, who has made deeper excavations than his neighbours, to remove the water which has accumulated in such excavations if the result of the accumulation has not been to throw more water on to such neighbour's claims than would naturally flow there.

Such claimholder is not liable for the overflow of water with increased force on to his neighbour's claims if such increased force is caused by their recommencing work after their claims had been unworked for some time.

Mr. Forster and Mr. Juta appeared for the appellant; and Mr. Solomon, Q.C., Mr. Schreiner, Q.C., and Mr. Webber for the respondents.

This was an appeal from a judgment of the High Court of Griqualand given in favour of the defendants (present respondents).

The facts as gathered from the declaration are as follows:

The plaintiff (present appellant) is a digger residing at Beaconsfield, and is the lessee of seventy-six claims in the Du Toit's Pan mine, known as the Central Dorstfontein Block.

The plaintiff hired the claims on the 16th September, 1891, and has since been engaged in mining operations on the same, and more particularly up to the 30th January, 1892, he was engaged in working certain ten claims of the said block, numbered as follows: 849, 850, 851, 852, 853, 879, 878, 877, 876, and 875.

The claims in the said mine immediately adjoining the plaintiff's claims above referred to, and on the eastern side thereof, are now, and have been since the end of 1889, hired by the defendants

Before the plaintiff commenced mining operations, and at the date of his commencing to do so, a large body of water was collected upon the claims hired by the defendants. The existence of the said body of water was due to excavations in and upon the said claims made in the course of mining operations. Since the commencement by the plaintiff of mining operations in consequence of the defendants not having worked the said claims hired by them, and in consequence of their neglect to take adequate steps to keep down the said water, it has largely increased both in area and depth.

On or about 30th January, 1892, the volume of water had increased to such an extent that it overflowed and flooded the eastern portion of the block hired by the plaintiff, namely, the claims specially described above, from which claims the plaintiff was then winning and hauling "blue" or diamondiferous soil, and prevented him from continuing his mining operations therein, and from such time until the present has prevented him from carrying on any mining operations in the said claims.

Until the water be removed the plaintiff is prevented from working his claims. The defendants were duly warned prior to January 30, 1892, that unless they took steps to remove the water in and upon their claims the said water would overflow and flood the plaintiff's claims, and cause damage to him, but the defendants in contravention (as the appellant alleged) of their duty in that behalf neglected and refused, and still neglect and refuse, to take steps to remove or deal with the water upon their claims, or the water which has overflowed on to the plaintiff's claims.

By reason of the flooding of the plaintiff's claim he alleged that he had sustained damages in the sum of £2,900.

The plaintiff claimed

(a) That the defendants be ordered forthwith to remove the said water which has overflowed from their claims and flooded the plaintiff's claims.

(b) An interdict restraining the defendants from allowing the water upon their claims to overflow and to flood the plaintiff's claims.

(c) The sum of £2,000 as damages.

(d) Alternative relief, and costs of suit.

The plaintiff in his alternative claim alleged that the claims in the Du Toit's Pan mine held by the plaintiff and defendants respectively were all held under leases from the London and South African Exploration Company, which leases provided *inter alia* that the said claims were so leased with full and free liberty, licence, and authority to and for the said lessees and their assigns, agents, servants, miners, and workmen, to dig and search for diamonds and precious stones therein, subject to, and in accordance with the rules and regulations in existence at the time of the granting of the said

leases, or which might thereafter be made by the Government for the management of mines of this class within the Colony.

That no Mining Board had been elected for the Du Toit's Pan mine, but for many years and up to the present time there had existed, and does exist, a Board of three persons appointed by the Governor, under the provisions of section 58 of Act 19 of 1883, and possessing all the powers and duties in the said section referred to.

That by Government Notice, No. 273 of 1884, notice was given that His Excellency the Officer Administering the Government, with the advice of the Executive Council, had been pleased to approve of certain bye-laws, adopted on 4th March, 1884, by the said Board, to Nos. 4 and 6, of which the plaintiff craved leave to refer, and which are still in full legal force and effect.

The plaintiff alleged that the defendants were bound to work their claims in such manner as not to contravene any of the provisions of the said leases and bye-laws, but that in contravention of the same the defendants had allowed water to collect in large quantities in their claims, that they had neglected to remove the same, and had allowed it to overflow into the plaintiff's claims and flood them, to the hindrance and damage of the plaintiff in his mining operations.

The defendants said in their plea, *inter alia*, that the plaintiff was the sub-lessee of the seventy-six claims above referred to from the New Gordon Diamond Company (Limited), who are the lessees of the same from the London and South African Exploration Company (Limited), and the registered claim holders in the said Du Toit's Pan mine in respect of the said claims.

They admitted that prior to the time when the plaintiff commenced mining operations, and at the said date, a large body of water had accumulated on certain of the claims hired by the defendants, and adjoining those worked by the plaintiff.

The defendants further said that their mining operations had been conducted in the ordinary and proper mode of mining in Griqualand West, and that the accumulation of water complained of was due to natural gravitation.

They further said that there was no legal obligation cast on them to work their said claims, or to remove the said water which had accumulated on the same, and that they had ceased working their said claims to the plaintiff's knowledge prior to his said lease.

Finally the defendants submitted that the plaintiff, not being himself a lessee from the Exploration Company, or a claimholder in the said mine, was not entitled to avail himself of the conditions in the said leases from the said company, or the said bye-laws.

The Court below held that the case was one of *damnum absque injuria*, and gave judgment in favour of the defendants.

From this judgment the present appeal was brought.

Mr. Forster was heard for the appellant, and contended that the non-working of the defendants had caused the damage by an accumulation of water. The defendants should be compelled to work on. Though there may not be a statutory obligation to work, there is an implied obligation, and as it exists the respondents must work or be liable for the consequences. If they decide not to work, they are liable for damages which may ensue. The non-working of a claim amounts to a non-natural user. The fact of allowing water to escape, and the fact that water had accumulated are wrongs. They must take away the danger which they have brought there. The non-working is the essence of the offence. The non-working renders a miner liable if, by reason of non-work, damage results to his neighbour. (See *Du Toit's Pan Regulations 4 and 6*.) The cases quoted against the plaintiff only lay down this principle, that where the stratum is inclined there is no servitude on the upper proprietor to keep the lower free from water. "*Smith v. Kenrick*" (7 C.B., 516); "*Baird v. Williamson*" (38 L.J.C.P., 101); "*Wilson v. Waddell*" (L.R. 2, A.C. 95); *Addison on Torts* (6th Ed., 869). The mining has not been proper and systematic here. The lower proprietor cannot throw up his claim so as to prevent others working. "*Fletcher v. Rylands*" (8 E. and L.App., 830). This is foreign water; we do not object to the daily waste. He further quoted "*Jones v. Festiniog Railway Company*" (8 L.R.Q.B., 788); "*Dixon v. Metropolitan Board of Works*" (7 Q.B.D., 418); "*Crowhurst v. Burial Board of Amersham*" (4 L.R.Ex.Div., 5); "*West Cumberland Iron Company v. Kenyon*" (11 L.R. Ch.Div., 782); "*Snow v. Whitehead*" (27 Ch.Div., 588); "*Ballard v. Tomlinson*" (29 Ch.Div., 115); "*Reinhardt v. Mentasti*" (42 Ch.Div., 686); "*Firth v. Bowling Iron Company*" (8 C.P.Div., 254). The nature of the damage was known to defendants, and the fact that it must ensue. "*Humphreys v. Cousins*" (2 C.P. Div., 289); "*Goode & Smith v. Hall*" (1, G., 526); "*Murtha v. Von Beek*" (1 App., 121). *De Beers* have prevented us from working. "*Harrison, Ainslie & Co. v. Lord Muncaster*" (L.R.Q.B. for December, 1891, p. 60); "*Bank of Africa v. Levin*" (8 G., 245); "*Leo v. Ramsbottom*" (1 App., 40); *Digest* (89-3, 1, 4, and 5); *Voet* (89, 8, 3).

The respondents were not called upon.

The Chief Justice, in delivering judgement, said: This case has been argued with very great

ability and fairness by Mr. Forster on behalf of the plaintiff, but he has not succeeded in creating such a doubt in our minds as to induce us to hear counsel for the defendants. He has cited many cases, both South African and English, but as those cases have been fully commented upon by this Court in previous appeals, there is no need for further comment upon them. In reference to the last case cited by him ("*Harrison v. Muncaster*," Q.R.Rep., L.R. 1891, p. 60), that has not been quoted before, but it really has no application inasmuch as the question there to be determined was not whether there had been an infringement of a right given by common law, but whether a covenant between the parties had been broken. There are two questions to be decided: Firstly, have the defendants committed any wrongful act causing damage to the plaintiff; and secondly, have the defendants been guilty of an omission of a legal duty which they owe to the plaintiff. Now what wrongful act have the defendants committed? It is part of the plaintiff's case that they have done nothing at all, and that it is owing to their want of diligence that the plaintiff has been damaged. The defendants' predecessors in title worked down their claims properly, skillfully, and with much diligence. But part of their ground reached a much lower level than that of their neighbours. In the excavations so made water has accumulated. The plaintiff's predecessors in title were not so diligent as those of the defendants, with the result that their claims are at a higher level than those of the defendants. The Court below has found as a fact that the result of the accumulation of water in the defendants' claims has not been to throw more water on to the plaintiff's claims than would naturally flow there. But it has been strongly urged for the plaintiff that the effect of the accumulation has been to throw the overflow water with greater force than its natural force on to his claims. But this increased force only arose when the plaintiff, after his claims had been unworked for a long time, began again to work them. If he had left them as they were, the daily increase would have only been the natural increase flowing in from the sides of the mine. Of course, when he recommenced working the immediate effect was to throw an increased overflow on his claims, but this increased overflow was caused, not by any wrongful act of the defendants, but through the want of diligence of the plaintiff and his predecessors in title. They did not keep pace with their neighbours, and if, in consequence, they now suffer in their working, the plaintiff cannot blame his neighbours for having gone on faster than he did. In effect, we are now asked to punish the defendants because their predecessors in title have in the past been more diligent in working than the

plaintiff or his predecessors in title. In my opinion the evidence furnishes no proof of any wrongful act committed by the defendants to the prejudice of the plaintiff. The next question is whether the defendants have been guilty of any omission of a legal duty which they owed to the plaintiff. The Mining Board bye-laws which have been quoted have no application to this case. But then it is said that the defendants ought to have continued to work their claims, and that if they had done so in the ordinary manner they would have pumped the water out of the lower levels of their claims. It is true they would have pumped out the water if they required it for washing or other purposes, or if they found it necessary to do so for the purpose of taking soil out of their claims. But that is a matter which concerns them alone. They owe no duty to their neighbours to take water out of their own claims. The case of "*Murtha v. Von Beek*" decided that the common law as to lateral support does not apply as between claimholders in the same mine. Strangely enough I find that in one of the United States the Supreme Court has arrived at a similar decision in regard to open workings of gold-mines. ("*Hendrick v. Spring Valley Mining Company*," 41 Amer. Rep. 57.) That two tribunals far distant from each other should independently have arrived at such a conclusion is a strong proof how inapplicable the principle of lateral support must be to mines which are worked in the open. But it does not follow that every principle of the common law is to be set at naught in regard to such open workings, and that obligations are to be imposed which are not absolutely necessary for the proper exercise of the different miners' rights. There is a duty to work down claims, but it does not follow that any claimholder, having worked down his claims with greater diligence than his neighbours, should be held bound to utilise the water which, owing to his greater diligence, has collected in his lower levels. He surely is justified in staying his hand until his neighbours have worked down their claims to his level. While so staying his hand, there lies no duty upon him to pump out water which cannot injure his neighbours who have been equally diligent with him in working their claims. The defendants therefore have not been guilty of the omission of any duty which they owed to the plaintiff. If the plaintiff's predecessors in title had worked as diligently as these of the defendants the present difficulty would not have arisen. The full and able judgments of the judges in the Court below leave nothing else for me to say. The appeal must be dismissed with costs.

Mr. Justice Buchanan said: Mr. Justice Solomon, in the judgment in the Court below, has very concisely reduced the issues in this case to the following propositions, viz., either that the

flooding of plaintiff's claims was due to the so-called excavations upon the defendants' claims, and that the defendants were legally liable for such injury; or that it was the duty of the defendants to keep down the water coming into their claims, so as to prevent its flooding the adjoining claims in the mine. These same propositions have been put in other words by the Chief Justice. It is evident that the conclusions to be formed on these propositions must greatly depend upon the facts proved. Plaintiff and defendants are neighbouring claimholders in the Du Toit's Pan mine, and the defendants' predecessors appear to me to stand in the position of the diligent miner; whereas the plaintiff's predecessors have been the laggards. I see from the evidence that for some time before the plaintiff took these claims the owners of both lots had ceased to work, and during this period water accumulated in the mine. Counsel for the appellant is not prepared to dispute any findings of fact in the Court below, and has only argued against the inferences drawn from those facts. Now, the learned judge from whose judgment I am citing states that the evidence has satisfied him that the flooding of the plaintiff's claims was directly due to the tapping of the spring in the reef, and not to the defendants' excavations. The water from these springs issued from the reef at points higher than the plaintiff's claims; this water naturally found its way by the force of gravitation to the lowest part of the mine, and it is admitted that if the plaintiff's claim had been at a lower level than the defendants' the water would have come upon his claims, and it is clear that if it had not been pumped out it would have accumulated there and would have flooded his claims. The quantity of the water was not in any way increased by the defendants' excavations, the only effect of these being that their claims were first flooded; but the flooding itself was entirely due to the fact that the water was allowed to accumulate in the mine. That being so, how can it be said that the flooding was due to the defendants' excavations, seeing that it would have taken place had there been no such excavations. The plaintiff, however, attempted to prove that if the water had flowed directly into his claims from the sides of the mine he could have easily dealt with it, whereas coming as it did from the accumulation of water in the defendants' claims it was impossible for him to cope with it, inasmuch as it came with a head and therefore with greater force than if it had come on rough ground. But here again the learned judge states he is of opinion that the plaintiff has failed in his facts, and that the evidence shows that the effect of the defendants' operations was not to throw upon the plaintiff's land any burden which it had not borne

before. The learned Judge-President in the Court below could not find that there had been anything wrongful in the working down of the defendants' claims, while, on the contrary, if these claims had been left at a higher level, below the source of the water, but above plaintiff's level, the bulk of the water would have reached the plaintiff all the sooner. The plaintiff has not even removed the daily rush of water, but has allowed it to increase. On these facts his lordship came to the conclusion that the defendants' conduct in ceasing to work their claims was not *ipso facto* a wrong to their neighbours. It is this ceasing to work upon which the appellant's counsel has founded the whole of his argument. After carefully weighing that argument, I am unable to go with the appellant. I concur therefore in holding that this appeal must be dismissed with costs.

Mr. Justice Upington concurred.

[Applicant's Attorney, D. Tennant, jun.; Respondents' Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. 18th Aug.
Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

KRUGER AND OTHERS V. T. C. DE WET.

Mr. Shell moved for the final adjudication of the defendant's estate as insolvent.—Granted.

COLONIAL GOVERNMENT V. J. T. MORGENROOD.

Mr. Giddy moved for judgment in default of appearance against the defendant for £45 4s. 10d., less £1 6s. paid on account, for rent.—Judgment as prayed.

STANDARD BANK V. A. T. VAN BUUREN.

Mr. Graham moved for judgment in default of appearance against the defendant for the sum of £272 1s. 2d., the balance of account for money lent and advanced.—Judgment as prayed.

ADMISSION.

On the motion of Mr. Tredgold, Hillegard Muller Lourens was admitted as an attorney and notary. The oaths to be taken before the Resident Magistrate of Riversdale.

In re PETITION OF EMMA CONTENTI.

Public Health (Contagious diseases)—Act 39 of 1885, Sections 10 and 12—Reputed prostitute—Information—Evidence.

The information or statement in writing on oath referred to in section 10 of Act 39 of 1885 need not necessarily be laid before the same Magistrate who makes an order under section 12 of the Act.

Mr. Molteno moved for leave to bring certain proceedings before the Resident Magistrate of Port Elizabeth under review. It appeared that information was sworn before Mr. Uppleby, a Justice of the Peace at Port Elizabeth, against the petitioner by a woman, herself a prostitute, alleging that the petitioner was a common prostitute. Proceedings were taken before the Magistrate, and he ordered the petitioner to undergo an inspection on the 28rd of this month under Act 39 of 1885. In these proceedings petitioner swore that there was no ground for the charge. She had been living with her husband till February, 1892, when he assaulted her and was punished for it. She left him and could trace all her movements since. Mr. Molteno urged that the whole proceedings were irregular, as they should not have been begun before a justice of the peace, but the information should have been laid directly before the Magistrate. There, however, appeared to be no procedure for appealing under this Act.

The Chief Justice said that he had no doubt that the Court had power to review proceedings under Act 39 of 1885. The grounds upon which it was competent to bring the proceedings of inferior Courts under the review of the Supreme Court were: (1) incompetency of the Court in respect of the cause; (2) incompetency of the Court in respect of the judge himself; (3) malice or corruption on the part of the judge; (4) gross irregularity in the proceedings; (5) the admission of illegal or incompetent evidence. If the evidence had been so clear and conclusive that no reasonable man could say that the petitioner had acted as a prostitute, malice might be inferred on the part of the Magistrate, and the Court would order the record to be sent up and the proceedings reviewed, but the case was one of credibility, the evidence of two witnesses was direct, and the Magistrate appeared to have believed these witnesses. The Court therefore could not interfere, and the application must be refused. As to the point of laying the information he (the Chief Justice) was of opinion that the affidavit need not be sworn before the same magistrate who makes an order under section 12, but before any one competent to administer oaths.

RUMI V. RUMI.

This was an action for divorce, brought by the husband against his wife by reason of her adultery.

Mr. Juta appeared for the plaintiff, the defendant being in default.

Mr. Nerman Lacey proved the marriage.

Angelo Rumi stated he was married in December, 1884, and lived with his wife until 1892. In February of that year his wife left him. He was at Kalk Bay, she in town. He knew Siegfriedson. He was a friend of theirs. He had no quarrel with his wife. He believed she went to England. The photograph put in was of himself and his wife.

Mr. Juta read the evidence, taken on commission, of Amy Minna, stewardess on board the Mexican, who stated that Siegfriedson and the defendant travelled to England as man and wife in the same cabin. She recognised defendant by the photograph.

The bedroom steward corroborated her, and stated he had seen them occupying the same berth.

The Court granted the decree as prayed.

BEVERN V. DELL. { 1892.
18th Aug.

Shares—Purchase—Repudiation—Agent—
Authority—Action.

Mr. Schreiner, Q.C., and Mr. Castens appeared for the plaintiff; Mr. Graham and Mr. Watermeyer for the defendant.

This was an action for the recovery of £222 18s. 9d., with interest at 6 per cent. from 28rd February, 1889, being the amount of a draft paid by plaintiff's representative and for which plaintiff alleged that he had received no consideration.

The facts as disclosed in the declaration are as follows:

The plaintiff resides in Cape Town, the defendant at Johannesburg, and in April, 1892, the defendant, while in Cape Town, was arrested, and his person attached *ad fundandam jurisdictionem*, but he was released on giving security. The defendant and his son, Charles Dell, carried on business as partners in Johannesburg. In February, 1892, the defendant drew a bill for £222 18s. 9d., payable at sight, on the plaintiff, against 800 shares in the Nevada Silver-mining Company. This bill was paid by the plaintiff's representative in Cape Town, without plaintiff's knowledge, and was so paid for the protection of the honour and credit of the drawers. The plaintiff never received consideration for the bill, and at no time gave authority for the aforesaid draft or bill, and has made demand for the payment of the amount of the bill, and drawn on the defendant, but the bill has been dishonoured. The partnership between defendant and his son has been dissolved. The plaintiff

tenders the 800 Nevada Silver-mining shares, and claims payment of £222 18s. 9d.

To this allegation of facts and claim the defendant pleaded that the plaintiff had expressly asked him and authorised him to buy shares for him in October, 1888, while he was in Cape Town, to the extent of £500, and authorised him to draw upon the plaintiff to that amount. That he bought 800 Nevada Silver shares for £222 18s. 9d. on behalf of the plaintiff, and forwarded them to him, and drew upon him to that amount, the draft being honoured with plaintiff's knowledge and consent. That the plaintiff had expressed his satisfaction at the purchase. Afterwards plaintiff wished to repudiate, but defendant would not allow him to do so. The transaction was not a partnership one, and the shares were never tendered back until the suit was commenced. On these pleadings issue was joined.

Mr. Alfred Bevern, the plaintiff, examined by Mr. Schreiner, stated that he saw the defendant in October, 1888, but he never gave him authority to buy any shares for him. On the 28rd November he received a wire from Dell telling him that he (defendant) had bought 500 shares in a new company, and had drawn on plaintiff. Witness did not know what company was referred to, and wired to defendant for particulars. Prior to January, 1889, witness had had no transactions in shares. On 28th February witness arrived in Johannesburg, and on 8rd March he received a letter from his Cape Town manager (Gibbs) telling him that he had honoured Dell's draft for £228 11s. 6d. for 800 Nevada shares. Subsequently witness met Dell, and told him that he (witness) did not want the shares. Defendant told him that it was all right, and that he had better see his (Dell's) son about the matter. Witness saw Dell junior, but nothing came of the interview. At a subsequent interview with defendant, the latter told witness that the shares had not turned out as well as he had expected, and that witness could re-draw on him for the amount of the shares. On return of witness to Cape Town he re-drew on defendant, but the draft was dishonoured. On 15th May witness returned to Johannesburg, taking the scrip and draft with him. He instructed Mr. Attorney Robertson to recover the amount of the dishonoured draft from Dell, but Robertson did not do so. Afterwards, in April, 1892, he had Dell, who was at that time in Cape Town, arrested to found jurisdiction. Dell, however, found security in the sum of £800, and the present proceedings were instituted. The shares were still in the possession of Robertson, and witness had not realised a penny out of them.

Cross-examined: Witness never authorised Dell to buy any shares for him. He had no conversation with defendant in February, 1889. He was positive that when he saw defendant in Johannes-

burg he referred him to his son. He never received the letter of the 8th March. He saw it for the first time a few days ago. He did not repudiate the transaction in his letter of August 29, as he thought Dell was well aware of it. He had a good balance at his bank in March, but subsequently had to arrange for an overdraft. He dealt largely in shares at one time. He had transactions with Wolff. He never wrote to Dell during 1890-91 about this sale. He did not think Dell could have misunderstood him; he gave him no authority.

Re-examined: On his second visit he put the matter in the hands of his attorney. He never dealt in Silver shares.

By the Court: The first he heard of the Nevada shares was from Gibbs. He did not remember receiving the letter before August 29, but he received a wire. He only met Dell after being about six days in Johannesburg.

Andrew Black Spolander stated he had been a clerk to Robertson, Bevern's attorney. Bevern left a power with him. He saw the draft and scrip. These papers were all in the office when he left. He was in Johannesburg from May to July. Mr. Dell, jun., came to the office. He told witness he would send a cheque in the afternoon, but did not say what for. The only transaction Dell had with their office was about this affair.

Cross-examined: He could not swear that Dell had no private transaction with Robertson.

A. H. McLeod stated that he was an attorney managing this case, and was in the business of C. and J. Buissonne as clerk. He had been advised that Robertson was at Lydenburg, but had received no reply to letters and wires directed there.

John Danvers stated that he was a broker, and was at Johannesburg in 1889. Bevern's letters were sent to his care. He remembered the Nevada Silver shares. He went to see Dell when he got the telegram. Dell said he had authority to buy. He could not swear that he had received the telegram now put into his hands, nor that he had shown it to Dell.

Cross-examined: If Dell said he never saw it he should not be prepared to contradict him. He did not think it likely he would have shown the telegram to Dell.

Mr. Graham called

James Dell, who stated that he had been manager of the Cape Railways, but went to Johannesburg before 1886, where he now was. He speculated successfully, and in October, 1888, he came to Cape Town. He bought some furniture at Bevern's. Bevern took him round, and they spoke about shares. Bevern said he would consider it a favour if Dell would buy shares for him to the extent of £500. Bevern told him to draw on him and he would honour the drafts.

He returned to Johannesburg. He tendered for Glencairns for himself and Bevern, but withdrew his tender. He advised Bevern of having tendered and drew on him. In February he bought some Nevadas. He bought 1,900, and let Bevern have 800. He would not have bought unless Bevern had told him. He made no profit, but could have if he had sold immediately. He still had his shares. The average price was 14s. 9d. Bevern arrived in Johannesburg the day after he had drawn on him, before the draft could possibly have arrived. Witness met him and told him he had bought Nevadas, and had drawn. Bevern said it was all right, and his bookkeeper would honour the draft. He could not be mistaken about this; he spoke first. His son afterwards told him that Bevern did not want them, as someone else had bought Nevadas for him. On that day he wrote the letter of 8th March. He would not take the shares back, as it was a *bona-fide* authorised transaction, and Bevern had ratified it. He never heard the letter had not been received; it was sent in the ordinary course of business. Bevern wired, and a draft was tendered. He could not remember if scrip was attached. The next demand he got was from Robertson. Danvers never showed him a telegram.

Cross-examined by Mr. Schreiner: He knew Bevern, but had no business transactions with him, or share transactions. He had a good balance when the draft was drawn on him, and up to March. He never underwrote any shares. He bought all his shares in open market. He allotted 800 to Bevern. He never wrote to Bevern between the transaction in Glencairns and Nevadas. Bevern never mentioned what sort of shares he was to buy. He understood mining shares of any sort. Bevern arrived in Johannesburg before February 28. He met him accidentally. He opened the conversation. Bevern took no proceedings until the Nevada Company went into liquidation. He only knew Robertson in regard to this matter.

Mr. Graham closed his case.

Mr. Schreiner argued on behalf of plaintiff. Mr. Graham for the defendant was not heard.

The Chief Justice, in delivering judgment, said he was perfectly satisfied that in October, 1888, when Dell was in Cape Town, he understood from Bevern that he was authorised to buy scrip at Johannesburg to the extent of at least £500, and to draw on him for the money. The only question was—did the plaintiff himself understand the arrangement? Upon this point he thought the conduct of the plaintiff showed that he did understand it. During the very next month he received a communication from Dell to the effect that he had purchased 500 shares in a new company, and had drawn upon the plaintiff for the

amount of the purchase price. The plaintiff when called upon to explain why he wired for particulars, said he did not understand that there was any arrangement, but simply wanted particulars for the information of his friends. If there had been no such arrangement the plaintiff would have expressed some astonishment when he received the communication from Dell, but instead of that he asked for particulars. The next question was—was there any ratification? On this point the evidence of Dell was direct, that he saw Bevern before he had heard from Gibbs, that the draft had arrived in Cape Town, and that Dell told him about these Nevada shares, and that he had bought them for a certain price. At this interview Bevern expressed his satisfaction, and said that the draft would be honoured. Dell was quite prepared to produce his letter-book, but he (the Chief Justice) saw no necessity for such a course, as Dell had sworn positively that he had compared the copy with the original in the letter-book. The opinion of the Court was in favour of the evidence of Dell, and therefore judgment must be given for defendant with costs.

[Plaintiff's Attorneys, Messrs. C. & J. Buissonne; Defendant's Attorneys, Messrs. Reid & Nephew.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] 1892. 19th & 20th Aug.

GREY V. LEA.

Partnership—Account—Balance—Action.

Mr. Sheil appeared for the plaintiff, and Mr. Graham for the defendant.

This was an action instituted by Charles Grey against William Lea for £67 9s. 10d., alleged to be due in connection with the carrying out of certain sewage works for the Town Council of Cape Town, and known as the Adderley-street Outfall Contract.

The declaration alleged that in or about the month of August, 1888, the defendant and one Thomas Teague entered into a contract with the Town Council of Cape Town for the construction of certain sewage works, the contract being known as the Adderley-street Outfall Contract.

That in the month of January, 1889, the defendant and Teague approached the plaintiff, and it was agreed between them that the plaintiff

should assist them in carrying out and completing the aforesaid contract, and that he should receive an equal or third share of all the profits to be derived from, or should pay a third share of all the losses which might be sustained by the said contract, the same to be calculated from the date of the commencement of the work, to wit, from the month of August, 1888.

That in terms of the aforesaid agreement, the plaintiff in the said month of January, 1889, duly assisted the defendant and the said Teague to carry out the said contract, and continued to do so until the month of March following, when the defendant left for England, without having accounted for the moneys which he had received on account of the said contract, and remained out of the Colony until the following September.

That the aforesaid contract was duly carried out by the plaintiff and Teague during the defendant's absence, and was duly completed by them and taken over by the Town Council in the month of August following, and that thereafter all accounts between the plaintiff and the said Teague were duly settled.

That the defendant was indebted to the plaintiff in connection with the said contract, and in respect of certain payments made by the plaintiff on account of the defendant in the sum of £91 7s. 1d., less £23 17s. 8d., being the amount of certain moneys and goods received by the plaintiff from the defendant, leaving a balance of £67 9s. 10d. still due by the defendant to the plaintiff.

The plaintiff claimed:

- (a) Payment of the said sum of £67 9s. 10d., with interest *a tempore moræ*.
- (b) Alternative relief.
- (c) Costs of suit.

The defendant in his plea alleged, *inter alia*, that in addition to a third share of the profits to be derived from the contract, he was entitled to £12 in connection with certain diving operations alleged to have been undertaken by him in connection with the contract.

He denied that the plaintiff was entitled to share in the profits of the contract from August, 1888, but alleged that the same were only to be calculated in favour of the plaintiff from January, 1889.

He specially pleaded that he had duly accounted to the plaintiff for all moneys which he had received and disbursed before he left for England, that he had handed the books to the plaintiff, and that the latter had declared himself satisfied with the correctness of the accounts.

The defendant alleged that the plaintiff retained possession of the books until May, 1892, when they were returned to the defendant, but upon inspecting the same he ascertained that the cash-book had been partially destroyed, and that some of the

leaves containing entries of moneys received and expended by the defendant in connection with the said contract had been torn out, that the defendant had demanded from the plaintiff the missing portions of the said cash-book, but that the plaintiff had failed to produce them.

The defendant denied the correctness of the plaintiff's account annexed to his declaration, and claimed in reconvention the sum of £282 7s.

The plaintiff in his replication denied any knowledge of the alleged agreement, by which the defendant was to receive £12 a month in connection with the diving operations referred to in the plea.

He denied that the terms of the partnership were as alleged by the defendant. As to the allegations regarding the cash-book, he admitted that the defendant had demanded the missing portions from him, but he alleged that the missing portions had never been in his possession.

He denied the correctness of the defendant's claim for £282 7s, and again prayed for judgment with costs.

Issue was joined on these pleadings.

Mr. Charles Grey, plaintiff, deposed that he was a contractor, at present residing in Wynberg. He remembered the defendant and Teague coming to see him in January, 1889, and asking him to join them in carrying out the Adderley-street outfall contract. He entered into partnership with them in that month, the basis of the agreement being that he was to receive one-third share of the profits from the commencement of the contract, namely, from August, 1888. Nothing was said about the defendant deducting £100 for the work done up to January, or about his receiving £12 a month for diving in addition to his one-third share of profits. Witness immediately entered on the work, and carried it on in conjunction with defendant and Teague until March, 1889, when the defendant left for England, without having accounted for the moneys which he had received under the contract. After the defendant left for England, witness and Teague carried on the work until the following July or August, when it was taken over by the Town Council, and all accounts between witness and Teague were settled. The defendant returned to the Colony in August, when an account was rendered, showing a credit balance of £80 odd in favour of witness. In settlement of this amount defendant gave witness an order on Bevern & Co., which, however, was not honoured, as defendant and Lea had overdrawn their account with Bevern & Co. Defendant put witness off from time to time with promises of settlement, and ultimately the present proceedings were brought.

Mr. Thomas Teague corroborated the evidence of the last witness.

Mr. Gibbs gave formal evidence as to the presentation of the order on Bevern & Co.

For the defence was called William Lea, jun., the defendant, who deposed that he personally had secured the contract from the Town Council, that Teague was not present when the agreement with Grey was come to, and that in terms of the partnership he (witness) was to receive £100 for the work already done in addition to his one-third share of the profits, besides £12 a month for diving work. He denied that any partnership account was ever rendered to him by Grey. He further alleged that none of the plant used in carrying out the contract had been returned to him, and that it was impossible to say what money he had paid to Teague, as the leaves of the cash-book containing the entries had been torn out.

Mr. E. R. Syfret gave formal evidence as to the accounts made up by him, which showed a balance in favour of the defendant of £286 odd.

Mr. John Cruickshanks, a professional diver, deposed that he was only employed for eighteen hours in connection with the contract, for which he received remuneration at the rate of 8s. an hour.

Sebastian Keever deposed that he was employed as a labourer in connection with the outfall contract, but he did no work after the 7th July.

Counsel for the plaintiff and the defendant having been heard, the Court delivered judgment.

The Chief Justice said this was the first case he had known in which partnership accounts were attempted to be settled without all the partners being before the Court. There were only three members of the partnership, and there ought to have been no difficulty in joining the third partner Teague with the plaintiff for the purpose of settling the account. The plaintiff had based his account upon payments made by him to Teague of one-third share of the profits. Those payments might have been justified by the fact that the plaintiff was left here as managing partner after the defendant left for England. Therefore, if Teague was entitled to a share of the profits he might fairly have claimed his share from the plaintiff. But the plaintiff should not have lost sight of the fact that the defendant was entitled to be credited with any amounts which he had paid Teague. The defendant in his evidence had stated that he had paid to and on account of Teague at least £80, and in support of his statement he produced vouchers. The only remaining item of importance was the claim of £48 for diving. Now, diving was a work which required special skill. Cruickshanks, who was employed after the defendant left for England, was paid as much as 8s. per hour for his work, and therefore he (the Chief Justice) was inclined to believe the statement of the defendant that he was to be paid specially for

diving. Further, he did not think that the defendant would have undertaken the diving unless it had been agreed that he should be specially paid for that work. He thought that justice would be done by giving absolution from the instance. He considered that the defendant had not been fairly treated in his absence, as the plaintiff had allowed Teague to take possession of all the diving and other gear, and that he had not sufficiently protected the interests of his absent partner. In order, however, to give an opportunity of joining Teague as a party to any subsequent action which might be brought, the judgment of the Court would be absolution from the instance with costs.

Plaintiff's Attorneys, Messrs. J. H. Reid & Nephew; Defendant's Attorneys, Messrs. C. & J. Buissinne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. 20th Aug.
Justice UPINGTON, K.C.M.G.]

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: Augustus Benjamin Bland Munro, Jan Stephanus du Plessis, Nicholas Johannes Stephanus Viljoen, George Aaron Smith King, and Gert Reits Meyer, J. son.

GENERAL MOTIONS.

JACKSON V. JACKSON.

Mr. Molteno, for plaintiff, moved for leave to sue by edictal citation in an action against his wife for divorce, by reason of her adultery.

A similar application was made in Chambers in September last, but refused, as the plaintiff was then living in Natal. In his present petition he stated that he had only gone to Natal in hopes of meeting his wife, who, he had heard, was likely to call at Durban, coming from Australia; further, that he had never abandoned his domicile in this country, and that he was living in Kimberley when his wife deserted.

The Court granted the order, the citation to be returnable on the last day of next term, publication to be made in one of the Sydney newspapers.

In re THE PAARL BANK, IN LIQUIDATION.

On the motion of Mr. Graham, the Court sanctioned certain compromises proposed to be effected by the official liquidators with shareholders and debtors.

The following is a list of the compromises:

1. Ernst Guiliam Malherbe, offers to pay the second call of £500 on each of his five shares, with interest from May 16, 1892, and the costs of this motion, and to forego his third deposit in the Paarl Bank for £262 6s. 4d., in settlement of his present and future liability in regard to the aforesaid five shares.

2. David J. Malan, a contributory of the Bank on 25 shares, and on 69 shares in the Union Bank, proposes to assign all his estate to the Paarl Fire Assurance and Trust Company, for the benefit of and to be divided *pro rata* between the two institutions.

3. Francis J. D. Malan, a contributory on 80 shares, and on 27 shares in the Union Bank, proposes to assign all his estate to the Paarl Fire Assurance and Trust Company for the benefit of and to be divided between the two institutions.

4. Jozua François Malherbe, jun., offers for his indirect liability on a promissory note for £200, signed by Jozua F. Malherbe, sen., a cash payment of £100.

5. Jacobus M. Marais, A son, offers for his indirect liability on a promissory note for £2,000 drawn by A. J. Marais, J. son, a cash payment of £100.

6. Gideon J. Joubert, Gabson, and Francis, Petrus Retief, in their capacity as executors of the late Jan F. Hugo, and registered holder of 68 Paarl Bank shares, offers for the liability on said shares of said estate, a cash payment of £475 and the costs incurred in placing them on the list of contributors.

In re THE WHITE HOUSE MINING SYNDICATE.

Mr. Graham presented the second report of the official liquidators.—The Court made the usual order.

The following is the report:

The liquidators, in submitting this, their second report, are pleased to state that the opinion expressed in their previous report that it might be advantageous to defer the realisation of the debt due by Cramer (practically the only asset of the syndicate) proved correct, as, after waiting a considerable period, they recovered from the debtor the sum of £805, the amount of his liability.

Claims have been filed amounting to £256 15s. 9d. for debts due by the syndicate, inclusive of an amount for £68 14s. 10d. for legal expenses in the Transvaal, which the liquidators had great trouble in getting specified.

In addition to this a claim for £4,000, made by Messrs. Van Soelen and Devenish for damages caused through the non-fulfilment of contract, has been submitted to the liquidators.

It appeared that the agreement was entered into by the syndicate's manager, Mr. Cramer, who had full power to do so, with Van Soelen and Devenish, for the purchase of certain properties reputed to be gold-bearing. Although the directors appear to have at the time taken exception to this agreement, its first condition was carried out by the payment of £500 to the sellers. The further conditions could only have been carried out by the raising of additional capital by the syndicate, and this was rendered impossible by the collapse of the share market.

Upon Messrs. Van Soelen and Devenish pressing for the fulfilment of the contract and instituting legal proceedings against the syndicate, no alternative remained to the directors but the placing of the syndicate under official liquidation.

As soon as Cramer's debt had been paid and available funds thus given the liquidators, the claim of £4,000 was presented.

While the liquidators were not prepared to recognise it as in any way established, they felt that there could be but little doubt that the claimants were entitled to some compensation, and in order to avoid having available funds absorbed in the costs of litigation, endeavoured to arrive at some compromise.

After protracted negotiations they have come to a provisional arrangement with the attorneys for Van Soelen and Devenish, for which they would ask the sanction of this honourable Court.

The arrangement is that the balance shown in the annexed account, £850, less a proportionate share of the legal expenses connected with the presentation and confirmation of this report, be paid to Van Soelen and Devenish, and the balance, subject to a similar deduction, to other creditors, who would thus get about 15s. in the £.

It may be well to mention that the liquidators have been grided by counsel's opinion with reference to the question as to whether Cramer had full power to enter into the agreement with Van Soelen and Devenish.

In re GREEN'S PETITION.

On the motion of Mr. Molteno, the Court made absolute the rule *nisi*.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, (K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.) 1892. 28rd Aug.]

REGINA V. M'BALO AND MATINVANA.

Native Territories Penal Code—Theft—Spor—Kraal—Search—Proof of guilt.

The provisions of the 200th section of the Native Territories Penal Code were intended to fix with civil and not with criminal liability the heads or owners, as the case may be, of kraals to or in the neighbourhood of which the spoor of stolen animals has been traced.

On a trial therefore for theft of stock under the code it is not enough to trace the spoor to the neighbourhood of a kraal, or to prove that the accused had improperly refused to permit a search of his hut in such kraal, but the proof of guilt should be as clear as in any other criminal case.

This was an appeal from the conviction of the accused by the Acting Resident Magistrate of St. Mark's on a charge of theft, in that they stole two goats on the 18th of July last from one Panca. It appeared from the evidence that Panca missed two goats on a Wednesday. He heard from one Simongo that he had seen them, and in consequence went to search the huts of the accused. The accused refused to allow their huts to be searched, but huts were searched at the other kraals near. Panca found the head and entrails of one goat near the river. Prisoners' huts were about 200 yards from the river, and there were a number of kraals along the river, many persons using the water near the spot where the goat was found. The goat was found after the accused had refused to allow their huts to be searched. Pani, a constable, stated that he had been out to search, and discovered that one of Sambuko's sons had found a carcase, and taken it to his own hut. Sambuko's son was not called as a witness. The defence set up was an *alibi*, several witnesses stating that the accused were at a "beer-drinking" during the whole of the night on which the goats were stolen.

Mr. Graham, for the accused, submitted that there was no evidence to convict. The Magistrate seemed to have considered the refusal to allow the huts to be searched as presumption of guilt.

Section 200, sub-section 2 of the Native Territories Penal Code (Act 24 of 1886), only allowed search when spoor was traced near a hut and lost. There was no spoor found here before the attempted search, and consequently no lost spoor. Neither Simongo nor Sambuko's son was called. It was merely a case of suspicion.

Mr. Giddy was heard in support of the conviction.

The Chief Justice, in delivering judgment, said: The 200th section of the Native Territories Penal Code was not intended to dispense with proof of guilt in cases of theft of animals where "spoor" has been traced to any kraal or locality in which the accused reside. It was intended to create a civil and not a criminal liability. The second sub-section gives the owner of any stolen animals, the spoor of which has become lost or obliterated, a right of search for any traces of such animal in any hut in that neighbourhood, but the refusal on the part of the owner of such hut to permit the search does not by itself prove that he is the thief. The proof of guilt, where theft is charged, should be as clear as in any other criminal case.

In the present case the prisoners were charged with the theft of goats. The goats had been missed on a Wednesday, and on the following day the prosecutor went to the huts of the prisoners, and asked for leave to search the huts, but this was refused. Afterwards on the same day some one belonging to the kraal of the prisoners found the carcass of one of the stolen goats near a river, about one hundred and fifty yards from the prisoners' huts.

There is nothing else to connect the prisoners with the theft. The finding of the carcass at that spot would, I am inclined to think, be quite equivalent to finding the spoor there and, if this be so, there would be as good ground for fixing the heads or owners, as the case may be, of the kraal with civil liability under the code as if the spoor had been found at the same spot. But the criminal liability of the prisoners must be clearly proved. Bare suspicion is not enough. The spot where the carcass was found was one to which every other member of the kraal had access. Anyone of them might have placed the carcass there.

The Magistrate seems to have thought that evidence which would be sufficient to render the members of the kraal liable for damages under the code is sufficient to convict them of theft.

In my opinion the evidence was wholly insufficient, and the conviction and sentence must therefore be quashed.

Mr. Justice Buchanan and Mr. Justice Upington concurred.

[Attorney for the Appellants, C. C. Silberbauer.]

UITENHAGE MUNICIPALITY V. THE COLONIAL GOVERNMENT. { 1892.
28rd Aug.

Contract—Interpretation—Maxim *expressio unius est exclusio alterius*.

By a contract between plaintiffs and defendant the former undertook to supply to the latter a certain quantity of water at the rate of £500 per annum "for a certain period defined in the 6th clause," and by the 6th clause it was provided that the defendant might put an end to the agreement at the expiration of each and every term of five years; provided, however, that not less than twelve months' previous notice to that effect was given to the plaintiffs.

Held, that the plaintiffs were entitled to terminate the agreement by giving twelve months' notice provided they supplied the water for the defined period of five years at least.

The maxim expressio unius est exclusio alterius cannot be applied to such a contract for the purpose of holding the plaintiffs liable to supply the water without any limit of time, whilst the defendant is at liberty to terminate the agreement by giving the notice required of him.

Mr. Juta appeared for the plaintiffs; and Mr. Schreiner, Q.C., and Mr. Giddy for the Government.

This was a special case stated for the decision of the Court, the plaintiffs being the Mayor Councillors, and ratepayers of Uitenhage, and the defendant the Commissioner of Crown Lands and Public Works, representing the Government.

The facts are as follows:

On 15th September, 1877, a contract was entered into between the plaintiffs and the defendant, in his capacity as Commissioner, through his duly-authorised agent, D. J. Scott.

By the first clause of the contract it was provided that the Commissioners of Uitenhage and their successors or assigns "will, at their own costs and charges, and for a certain period defined hereinafter in the 6th clause of the said contract, to be calculated from 1st January, 1877," supply to the Government a certain quantity of water; and by the 5th clause of the said contract the Government agreed to pay the sum of £500 per annum, payable half-yearly, for the said supply of water, and by the 6th clause of the said contract it was provided that the defendant might put an end to the said agreement at the expiration of each and every term of five years; provided, how-

ever, that not less than twelve months' previous notice to that effect was given to the plaintiffs.

The said contract was duly carried out by the said parties, and on the 8th December, 1890, the plaintiffs gave notice to the defendant that they would terminate the said contract on the 31st December, 1891, this said date being the expiration of the third term of five years from the beginning of the said contract, but the defendant refused and refuses to accept the said notice.

The plaintiffs contended :

That they were entitled to terminate the said contract by giving the twelve months' notice aforesaid, and that the said contract ended and terminated on 31st December, 1891.

The defendant denied the plaintiffs' contention, and contended that the said contract was still in existence, and binding upon the plaintiffs.

The parties prayed for judgment in their respective contentions, and that costs might follow the result.

Mr. Juts, for the plaintiffs, contended that they could terminate the contract on reasonable notice. The only reference to the period during which the contract was to last was in the 6th clause, but in the first a period is referred to. If that 6th clause had not been inserted reasonable notice on either side would have terminated the contract. If the mention of the Government prevents the plaintiffs from terminating, the contract would run for all time, but it is clear the agreement is terminable.

Mr. Schreiner submitted that it was purely a case of construction of the document. The maxim, *expressio unius est exclusio alterius*, must apply here. The Government can terminate, but not the Municipality. If no time had been fixed at all reasonable notice might have been given. The Government guarded against this. If the plaintiffs' contention is correct they could have terminated the agreement without notice at the end of five years. The Municipality is bound in perpetuity.

Mr. Juts, in reply, submitted that the 6th clause was in derogation of the rights of the Government, but that clause could not detract from the rights of the Municipality under the 1st clause.

The Chief Justice said: The defendant's contention, on behalf of the Government, is that the plaintiffs are bound to supply the requisite quantity of water without any limit of time, whilst the Government is at liberty to terminate the agreement by giving notice twelve months before the expiration of any term of five years.

If that is the meaning of the contract we must give effect to it, but it is not a construction which any Court is likely to adopt unless forced to do so by the language actually employed.

We are asked to apply the maxim *expressio unius*

est exclusio alterius, and to hold that because express liberty is given to the defendant to terminate the agreement therefore the plaintiffs are bound to supply the water so long as the defendant chooses to hold them to their contract. The maxim, however, is not applicable. If certain privileges in respect of notice are expressly conferred upon the defendant, that may be a reason for holding that no other privileges shall be enjoyed by him, but it is no reason for depriving the plaintiffs of rights which they would have enjoyed if the contract had contained no restriction as to time.

It is admitted that if there had been no such restriction either party would have been at liberty to terminate the agreement by giving reasonable notice to the other.

The document is obscurely worded, but it is not impossible, reading it as a whole and applying a reasonable construction to its language, to arrive at its true meaning. The 1st clause must be governed by the 6th. The 1st clause provides for the supply of the water "for a certain period defined hereafter in the 6th clause." The only period defined by the 6th clause is that of the first five years. Those five years had in any case to run, and the defendant, if he did not give notice twelve months before its expiration, would be bound to allow at least another five years to run. No such further restriction is placed upon the plaintiffs' rights. They were bound to supply the water for the defined period of five years, but for the rest reasonable notice only was in my opinion intended to be required from them.

Having supplied the water for the defined period of five years their notice of twelve months was in my opinion reasonable and sufficient to terminate the contract, and judgment must accordingly be given in their favour with costs.

Mr. Justice Buchanan: It would be much better if the parties had expressed their intention clearly. The presumption is that it was not intended to put an inequitable burden on the Municipality. It is an agreement to sell an amount of water annually, and it is only equitable to say that if one party finds the burden too onerous he might put an end to it on reasonable notice.

Mr. Justice Uppington concurred.

[Attorneys for the plaintiffs, Messrs. Fairbridge & Arderne; Attorneys for the Government, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. 25th Aug.
Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

FOUCHE V. STEYN.

On the motion of Mr. Jones, provisional sentence was granted for £165, due on a promissory note.

KEYTER V. BOTHA.

On the application of Mr. Graham, provisional sentence was granted on two mortgage bonds for £250 and £150 respectively, with interest at 8 per cent. from October 1, 1891.

TREDGOLD'S EXECUTORS V. WEHLBURG.

Mr. Tredgold moved for provisional sentence on a mortgage bond for £700, with interest at 6 per cent. from December 31, 1890, and £5 5s. paid for insurance premium.

Mr. McLachlan, for defendant, confessed judgment, and the property was declared executable.

MENDELSSOHN V. GRUMWALD.

On the motion of Mr. Jones, judgment was granted under Rule 329 for £25 1s. 5d.

ADMISSION.

Ex parte KRIGE.

Mr. Molteno moved for the admission of Mr. Christman Joel Krige as an attorney, notary, and translator.—Mr. Krige took the oaths, and was duly admitted.

REHABILITATIONS.

On motion from the bar, the Court granted the rehabilitation of the following insolvents: Marius Flemmer, Oekert Johannes Kruger, Joseph Wesley Frost, and Gideon Joubert.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE JACOBUS J. BOTHA.

Mr. Schreiner, Q.C., moved for a rule nisi

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requiring the executrix of the said estate to show cause why she should not be removed from the trust, she being incompetent through physical and mental infirmity to undertake the administration thereof.

The Court granted a rule nisi, returnable on 12th September, calling upon the respondent to show cause why she should not be removed from her trust in terms of section 25 Ordinance 104.

IN THE ESTATE OF THE LATE ISABELLA MANSON AND SURVIVING SPOUSE.

Mr. Juta moved for authority to the surviving spouse of the said Isabella Manson to retain possession of the landed property in the said estate, on passing a second mortgage thereon to secure the inheritance of the minor children, he being about to be married a second time.

The Court authorised the passing of a bond for £1,000.

THE PETITION OF JAN D. H. BLANCKENBERG.

Mr. Molteno moved for the attachment *ad fundandam jurisdictionem* of a certain piece of land known as Weltevreden, in the Cape division, the property of Erio Durr, and for leave to sue by edictal citation in an action to be instituted by petitioner to compel transfer of land purchased by him from the said Durr.

The Court granted the order, also leave to sue by edict, the intendit to be served with the citation (returnable 12th October). Personal service to be effected, failing which a further application to be made for direction as to publication.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. 26th Aug.
Justice UPINGTON, K.C.M.G.]

DIXON V. HAMPSON.

Diamond mine—Lease—Cession—Knowledge—Proprietors' resolutions—Evidence of occupation—Licence money—Action.

Mr. Schreiner, Q.C., and Mr. Molteno appeared for the plaintiff.

Mr. Juta and Mr. Tredgold appeared for the defendant.

In this action the plaintiff claimed £1,487 10s. being one-fourth share of certain licence-money

(£5,750) due to the proprietors of Kamfer's Dam, one of whom (the plaintiff) is, in terms of a certain lease dated 8th January, 1882, owner of 100 claims in the Kamfer's Dam mine, from the 1st of May, 1882, to 30th November, 1891, at the rate of 10s. per claim per month. The proprietors in 1882 leased these 100 claims to one Lynch on behalf of a certain syndicate. Maxwell was an owner at that date, holding one-fourth undivided share, and he sold his share to plaintiff. The defendants were two of the syndicate, and subsequently acquired all the rights of the syndicate, it being alleged that they had full knowledge of the transfer of all Maxwell's rights to the plaintiff. Under the lease a yearly rent of £8 per claim was payable, or 10s. per month per claim; but no payments had been made between May, 1882, and November, 1891, the total amount due now being £5,750, of which the plaintiff claimed one quarter.

The defendants admitted that they had acquired all the rights of the syndicate if there were any, and said that McDonald & Co. originally held one-third of the 100 claims, and the said Lynch one-third of sixty-six claims, and that these two had ceded all their rights to the defendants. They pleaded that they had never been given possession of these claims, but that plaintiff refused to give possession, saying that the lease was cancelled in November, 1882, and thus could not claim rent. They further pleaded that by a resolution of the proprietors of Kamfer's Dam, in March, 1882, it was resolved that if any proprietor disposed of his share the purchaser thereof should pay to the remaining proprietors 10s. per month per claim, and 10s. for a depositing site. The plaintiff acquired his right from Maxwell subject to this. In 1882 defendants held one-quarter share of the farm, and they subsequently acquired the shares of Lynch, Johnson, and certain shares of Abrams, with all rights. Under this the plaintiff is indebted to the defendants in the sum of £108, due from 2nd November, 1882, to July, 1883, on thirty-six claims; £186 due from July, 1883, to August, 1884, on thirty-six claims; and £1,602 due from August, 1884, to December, 1891, in respect of seventy-two claims, in all £1,845, which remains unpaid. By reason of this, and the damages sustained through being kept out of the claims, the defendants claim the sums of £1,845 and £6,400 as damages.

The plaintiff replied that he never refused to give possession of the claims. He denied that the resolution passed referred to shares in the farm, and further stated that he purchased from Maxwell without any term or condition, rendering him liable in respect of any claims in the mine, and that he never consented to be bound by any of the resolutions. He purchased one eighth in March, 1882, and another eighth at a later date. On these pleas issue was joined. The resolutions referred

to were: March 18, 1882, resolved "that in the event of any proprietor selling or otherwise disposing of any of his claims, or a portion thereof, a sum of 10s. per month will be charged for each claim by the proprietors of Kamfer's Dam farm; also a further sum of 10s. per acre per month for depositing sites, to be paid to the same." December 1, 1882, proposed "that the resolution of 18th March, 1882, be understood as follows: 'In the event of any proprietor selling shares or claims in the property, the purchaser shall be liable to all licences for claims, stands, depositing floors, &c., notwithstanding that such purchase be by the present proprietor or an outsider.'"

Mr. Schreiner opened the case, and called Andrew Reid, who stated that he resided at Johannesburg now, but knew the Kamfer's Dam property in 1881. He was a partner with Johnstone, who held one quarter-share in the farm. The Kamfer's Dam Diamond-mining Company was formed in 1881 to take sixty claims. He held Dixon's power of attorney in February, 1882. In 1882 the lease was made to Lynch, but they did not know whom he represented. Lynch held a share of the farm. On 18th March, 1882, it was resolved that the farm should be divided. He believed all the proprietors had to consent to any resolution being passed. The claims were allotted in July. He did some work himself. Maxwell did not work. The 100-claim block was not developed. He entered into negotiations with Maxwell to buy for Dixon in November, 1882. Maxwell was allowed to sell, and the purchase money was paid on 15th December, 1882. The sale was completed before December 1. On the 1st December the further resolution was adopted relating to "shares or claims." He was present at this meeting, not to represent Dixon, but as an owner. Dixon sued Maxwell in 1884, and got judgment for £1,400. This was settled by Maxwell passing transfer of his remaining share in August, 1884. There were no meetings of proprietors between 1884 and 1888. In 1888 there was some correspondence, and in that year Hampson first advanced his claim for licence money under the resolution. Two meetings of proprietors were held in 1888. The second broke up in confusion. The claims to licence money were mentioned. It was proposed to pay Hampson £500, and start afresh. Hampson would not consent, and said that he had counter-claims for licence money. He then owned half the farm. There was no further meeting. In October, 1891, the action of Dixon, Stuart and Reid v. Hampson and Abrams was instituted. The settlement paper was signed, and matter referred to arbitration, but the proceedings of the arbitrators were subsequently set aside.

Cross-examined by Mr. Juta: He did not know where his original lease was. Haarhoff Bros.

drew it up. It remained in their possession until 1888. The lease was never fully completed. The depositing sites were left blank. In 1888 the proprietors sent for the lease, and it was produced on 19th September, 1888. Demands were made for licences, and he considered that as these were not paid the lease was cancelled. He wrote to Hampson in 1891, maintaining that the lease was cancelled. In the action "*Dixon v. Hampson*," in the High Court, Dixon pleaded that the lease was of no effect. No rent had been claimed up to that time. Witness acted as Dixon's agent between 1882-88. Depositing sites were never asked for, but he would not have given them unless the licences had been paid. They would not recognise Hampson, because he would not show his deeds.

By the Court : The proprietor would not have allowed him to work unless he paid his licences. They said he had no right to claim, as he had no documents. No actual work was done.

By Mr. Juta : In 1891 he refused to recognise the lease. The proprietors sent for the lease in 1888, as they wished to see it. No other special reason was given. Witness had not individually made any claim for rent. There had been no claim since 1882. He did not remember Hampson speaking of depositing sites at the meeting in 1888. The share purchased by him for Dixon included claims. He bought Maxwell's right to claims. The proposal of 1888 had nothing to do with the lease. He represented Dixon at meetings. The declaration he made on the sale of Maxwell's share is correct. The date of sale is there—15th December, 1882. That was the day the money was paid. Maxwell could not sell without the consent of his co-owners. That consent was not given until November 29. He worked part of Dixon's claim in 1888.

Re-examined by Mr. Schreiner : He first saw Lynch's deed, ceding all rights to Hampson, when in Cape Town. He saw McDonald's cession in September last. After he saw these he entered into the settlement. Hampson stopped an attempt at flotation. Lynch went to England in 1888, to float a company. Hampson never gave up his right to the 100 claims.

By the Court : He was a claimholder himself, but had no claim licence to pay, as he was a proprietor before the resolution.

John Dixon, the plaintiff, stated that he resided at Johannesburg. He purchased Maxwell's share in 1882, but before that had nothing to do with Kamfer's Dam. He was never present at a meeting of proprietors until 1888. Before that he had no knowledge of licences on claims. Hampson wrote about them in March, 1888. He then came out from England, and saw Hampson. He then met Reid at Pretoria. He was at Kimberley in September. The lease was then

in Haarhoff's hands. He wanted to see the lease, as Hampson claimed under it. Hampson said he had also cessions from Lynch and McDonald & Co., but could not find the documents. The meeting was held, and he proposed and Reid seconded the resolution. Hampson claimed from Stuart and himself as being an original proprietor. He looked to the lease, and held Hampson liable upon it. He made the proposal to pay Hampson £500, and bring all the claims into one. This Thompson would not agree to. Witness considered Hampson liable on the hundred claims. He got transfer in August, 1884. Correspondence followed between him and Hampson in 1889. He denied Hampson's right to claim licences. In 1891 he instituted proceedings against Hampson for a division of the farm. A consent paper to a settlement was signed, the matter being referred to arbitration. It was not necessary to make claim for the 100 claims' licence money ; it was understood that this claim should go before the arbitrators. The arbitration was upset, and witness was ready to renew arbitration. He would not have consented to settlement if there were to be no payment on the old score. He was one of the trustees of the new company.

Cross-examined : The settlement was on the ground that the lease money should be paid. The pleading in the former case denies the existence of the lease, or in any event that it was cancelled. He was aware of the pleading. He would not have settled unless Hampson had paid up arrears, and could not tell why it was not mentioned in the consent paper. It was understood he was to pay arrear rent. It was to be decided by the arbitrators, because Hampson had large claims against witness. Hampson first claimed in March, 1888. He answered his (Hampson's) letter, but did not repudiate his liability. He first took up the position that the lease had been cancelled in 1891. One point was that the lease was not stamped ; another reason was to make Hampson establish his claims. Page (the secretary) had possession of the lease. In 1889 he wrote, saying he considered the lease broken ; this was merely a politic letter. He wished to come to a settlement. He thought it was cancelled in 1882 by the resolutions and letters of demand for rent. He never considered the lease actually cancelled. He saw the lease in 1888. Reid held his power from 1882 to 1888. There was no proposition at the meeting to fill in the depositing sites in the lease. Witness maintained Hampson could have his claims if he paid the licences.

Re-examined : He was willing to put in the depositing sites if the matter had been discussed. The annexure to the award showing claim was put in by witness.

Mr. H. S. Bell stated that he was an attorney of the Supreme Court, at present practising at

Johannesburg. He had acted as attorney for Dixon, and came with him to Kimberley in 1891. Proceedings were instituted, and the outcome of these was the settlement; the settlement was agreed upon after they saw Lynch and McDonald's cession to Hampson. They refused to recognise the lease, they wished Hampson to establish his right to it. They wished to see the documents. He acted as one of the arbitrators. Before the arbitration Coghlan (defendant's attorney) admitted his (defendant's) liability on the lease Coghlan was the other arbitrator, and no evidence was led on this point, they being at one on it. The award was made on January 22. It was set aside. Hampson handed in the protest after the award was made. Hampson has never claimed any damages for non-possession of the claims.

Cross-examined: He had been attorney for the proprietors but never made any claim for rent. The lease was the principal point at the arbitration. The amount to be received and paid under the lease was merely a matter of calculation. Coghlan distinctly admitted Hampson's liability for rent before the settlement. The mistake in the award was pointed out, but he was bound, having made it he could not alter it.

Re-examined: The new lease is for the unexpired period of the old.

John Vardy stated he was a partner in McDonald, Vardy & Co. He made the arrangement to cede the rights to Hampson in 1886. Hampson was to take over all their liabilities. There was no other consideration.

Mr. Schreiner closed his case.

Mr. Juta moved for absolution from the instance on the claim in convention, and (after consultation with his client) offered to forego the claim in reconvention, provided the judgment were for absolution from the instance with costs. He submitted that on his own showing the plaintiff would never have allowed the claims to be worked. The defendants had had no enjoyment of their rights. It was on the plaintiff to show that he had done all he could to give the defendants full enjoyment and possession under the lease.

Mr. Schreiner contended that the defendants had free use of their claims. The forfeiture was not enforced. They always asserted their rights under it. The plaintiff never interfered with their possessory rights.

Mr. Juta in reply.

The Chief Justice delivered judgment, and said there appeared to be an initial difficulty when the case was opened, and the evidence had confirmed that suspicion. The plaintiff owned one-quarter of the farm, and claimed against the defendant as lessee. The remaining owners were not before the Court, though this would not have been so much the difficulty, but that the defendant put in a counter-claim against all the owners, and by that

showed how necessary it was to have all the owners before the Court. If this point had been fully discussed, he would have been prepared to dismiss the case on that point, but the case proceeded. It thereupon lay on the plaintiff to prove that the defendant had occupation under the lease, or that he was always ready and willing to give the defendant occupation. There was a complete absence of evidence as to occupation. The marking of his name on the plan could hardly affect the point, and there was no proof of beneficial enjoyment. The defendants have asserted their rights, which have all along been strenuously denied by the plaintiff, but the assertion of a right does not amount to an admission of that right. There is no such assertion in the letters, and the instances shown do not amount to any. In the absence of this proof it lay on the plaintiff to prove he was always ready and willing to give occupation, but in this he has wholly failed. His own evidence showed he was not prepared. There was a statement made that the lease would be forfeited; rent was demanded, and there was no withdrawal of this statement, which all goes to show that the plaintiff denied the existence of the lease and refused to allow occupation. On these grounds the defendants are entitled to absolution from the instance. On the second claim it is necessary, as it affects all the owners, that all should be before the Court. It is the plaintiff's fault that all the owners are not before the Court, and absolution will be given on the claim in reconvention, but the plaintiff must pay all costs. The expenses of defendants as witnesses will, however, not be allowed. Judgment therefore of absolution from the instance, both on the original claim and the claim in reconvention, but the original plaintiff to pay all costs.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret; Defendant's Attorneys, Messrs. C. & J. Buissinne.]

CORTZEE V. CORTZEE.

On the motion of Mr. Moltene, a rule nisi was granted calling upon respondent to show cause why applicant should not be allowed to sue him *in forma pauperis* in an action for divorce by reason of his having committed the crime of rape.

IN THE ESTATE OF PAULSEN, DECEASED.

Mr. Graham moved for leave to the executor of the estate and guardian of the minor child to purchase certain farm known as Celeryfontein, in the district of Fraserburg, the property of the estate, on conditions approved of by the Master of the Supreme Court.

The Court ordered the matter to stand over for the production of the will and evidence of the Divisional Council valuation.

VENTER V. VENTER AND THE REGIS- { 1892.
TEAR OF DEEDS. { 26th Aug.

Marriage — Ante-nuptial contract — *Jus mariti*—Sale of land—Transfer—Registrar of Deeds.

The Court granted an order directing the Registrar of Deeds to pass transfer of land on a power signed by a woman married by ante-nuptial contract, the marital power not being excluded, and unassisted by her husband, the latter having received notice of the application and not appearing to oppose.

Mr. Schreiner, Q.C., on behalf of applicant, moved for an order requiring the Registrar of Deeds to allow transfer to be passed of four erven situate in the town of Sterkstroom, on a power of attorney executed by petitioner without the assistance of her husband, from whom she is living apart, and for an order to her said husband to pay the costs of the application, he having refused assistance unless allowed half of the purchase price of the erven. Notice of the application had been served on the husband, but he did not appear.

It appeared from applicant's petition that she was married by ante-nuptial contract to her present husband in January, 1876, but that the marital power had not been excluded. Eight years ago the parties separated, and since that time they have been living apart.

That she is at present the registered proprietress of four erven in Sterkstroom, upon which two mortgage bonds for £100 each exist.

That in March, 1891, she sold the ground to the mortgagee for £200, and executed the necessary powers and documents for effecting transfer, but that the Registrar of Deeds refused to register the transfer on the ground that the petitioner was not assisted in the power to pass transfer by her husband, and that he (the Registrar of Deeds) drew a distinction between petitioner's case and that of "*Van der Broek v. The Registrar of Deeds.*"

The petitioner's husband declined to assist petitioner unless he received half the purchase price, namely, £100.

Wherefore she prayed that the Registrar of Deeds might be compelled to pass transfer without petitioner being assisted by her husband.

Mr. Schreiner was heard in support of the petition, and contended that the principle was the same as in the case of "*Van der Breck v. The*

Registrar of Deeds" (8 Juta, 296), although that case referred to an executrix. On the question of costs he referred to "*Hutebeon v. Registrar of Deeds, Kaffaria*" (8 E.D.C., 229).

The Court granted the order with costs against the respondent Venter.

In re HERHOLDT'S PETITION.

Mr. Molteno moved for authority to the Registrar of Deeds to amend certain deed of transfer made in favour of the petitioner on the 5th of October, 1888, on the farm Snyders Kraal, in the district of Murraysburg, by describing it as portion of the said farm, instead of the remaining half, and referring to a former transfer deed instead of a quitrent lease.

The order was granted.

In re STUTTAFORD AND CO.'S PETITION.

Mr. Thorne moved for an order directing the Registrar of Deeds to cancel certain mortgage bond for £2,000, passed by petitioners on the 16th April, 1876, in favour of the Colonial Bank of Cape Town, the said bond having been paid and the bank liquidated, but the entry in the Debt Registry remaining uncancelled.

The order was granted.

REGINA V. TAYLOR. { 1892.
 { 26th Aug.

Witnesses — Depositions — Preparatory examination—Case remitted—Act 3 of 1861, section 29—Non-compliance with terms of section—Resident Magistrate.

Where a case has been remitted by the Attorney-General to a Resident Magistrate to be tried under his ordinary jurisdiction the depositions of witnesses taken at the preparatory examination must be read over to the prisoner at his trial to satisfy the requirements of Act 3 of 1861, section 29.

Mr. Graham appeared for the prisoner, and Mr. Giddy for the Crown.

This was the hearing of a summons for the review of certain proceedings held before the Resident Magistrate of Worcester, on the 28th July, 1892. The facts of the case are as follows:

The prisoner was charged with the crime of theft: "In that upon (or about) 19th June, 1892, and at (or near) Worcester, the said Frederick Taylor did wrongfully and unlawfully steal from the Worcester Post-office the sum of £1 in silver coins." The case was remitted by the Attorney-

General to be tried by the Magistrate under his ordinary jurisdiction. The prisoner was then arraigned under section 29, Act 8 of 1861 but the depositions of the witnesses were not read over to the prisoner, as is provided (as it was contended) by section 29 above cited. The prisoner pleaded not guilty. He was found guilty, however, and sentenced to pay a fine of £5. This was an application to have the proceedings quashed, on the grounds of the irregularity above stated.

The Magistrate stated in his affidavit, *inter alia*, that both at the preparatory examination of the accused and at his trial he was defended by an agent (J. F. Oliff), who was also present during the whole of the proceedings.

That at the hearing on the 26th July the evidence taken at the preparatory examination was not read over in court, but that the said agent then represented that the accused was of respectable family, and applied that no sentence of imprisonment might be passed upon him, but rather one of fine, and that not being prepared with sufficient precedents to show that fines have been inflicted for offences of this nature, the hearing might be postponed to afford him time to produce such precedents, which he accordingly did at the hearing of the 28th July.

That the action taken by the said agent in the matter appeared to deponent (the Magistrate) to amount to a confession of guilt, and in any case it was never pointed out by the said agent either in his address on behalf of the accused or otherwise, or relied on as a ground for discharging the accused, that the depositions taken at the preparatory examination were not formally read over.

That although the said evidence was not so read over, yet during the hearing of the case the Court had occasion to allude to some of the evidence given, bearing mainly on the charge of guilt of the accused in contradistinction from the guilt of his accomplice Stooskigt, for all which reasons the Magistrate submitted that substantial justice was accorded to the accused at the trial.

Mr. Graham contended that the proceedings were irregular, as it was clearly the duty of the Magistrate to have read over to the prisoner the depositions taken at the preparatory examination.

Further, that the case could not now be sent back to the Magistrate. He cited the following cases: "Regina v. Moula" (IX. Cape Law Journal 54); "Regina v. Mahatis and Booy" (C.L.J., Vol. 6, p. 180); "Regina v. Benoe" (1 Juta, 90); "Regina v. Myers" (2 Juta, 151).

Mr. Giddy: It is not imperative on the Magistrate to read the depositions; he has a discretion in the matter. Counsel referred to "Regina v. Solomon" (2 H.C.R., 198), and "Regina v. Bamberger" (1 Juta, 146).

Cur ad vult.

Postea (August 30th).

The Court delivered judgment.

The Chief Justice said this case raised an important point of procedure, namely, when a case was remitted to a Magistrate under his ordinary jurisdiction was it necessary to read over the depositions to the prisoner? Section 29 of Act 8 of 1861 enacted: "Cases remitted by the Attorney-General to Courts of Resident Magistrate exercising their ordinary jurisdiction . . . shall be proceeded with in all respects as if no preparatory examination had been taken in such cases, save and except that when and as often as the Resident Magistrate who shall try such case shall be the person before whom the preparatory examination was taken it shall not be imperative on him to recall any witness who formerly gave his evidence in the presence of such Magistrate and of the person accused, and it shall be competent and sufficient to read as evidence the deposition of such witness." . . . Now, reading this in the ordinary sense it might be arguable that where the statute says "read" it may not mean read aloud, but taken with what precedes this that is clearly not what the Legislature intended, because when the case is remitted it is really a fresh proceeding. Therefore the Magistrate proceeds to try the prisoner afresh, and there must be sufficient evidence given to convict. That can only be given orally and *visu voce* where there is a plea of not guilty. The section dispenses with the ordinary examination, and says the depositions may be read. This must be in the presence of the prisoner, and the contention raised for the appellant is correct. The Magistrate was evidently misled by the prisoner's agent, for on a plea being taken the agent used his endeavours to get his client off with merely a fine. The Magistrate should not have been misled, the law requires that the depositions should be read. Notice was given of appeal, and subsequently proceedings were taken under Rule 190. [Mr. Graham here explained how this was.] The Court now must be understood to quash the conviction by reason only of an appeal being noted. Review would only be granted for gross irregularity or the admission of illegal evidence. He (the Chief Justice) would not consider it a gross irregularity unless injustice had been done, but there was a good ground of appeal, as there was not sufficient evidence to convict the accused. No evidence was read. The appeal must be allowed and the conviction quashed. It is not a case for a new trial as the accused was charged, pleaded, and thus was in jeopardy, but no evidence was given. In Bamberger's case (quoted during the hearing) the case was sent back to be reheard, as

the prisoner had never been charged on the crime of theft, never pleaded to that charge, and consequently was never in jeopardy.

Mr. Justice Upington said he thought it would be well if the Law Department communicated with all Magistrates on this point, as he felt satisfied that many Magistrates did not read the evidence over in the presence and hearing of the accused.

The Chief Justice said it would be advisable to alter the charge sheet by adding to the printed form the words "and the evidence taken duly read over to him" in cases of a plea of not guilty.

[Attorneys for the appellant, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN { 1892.
and Mr. Justice UPINGTON, { 29th Aug.
K.C.M.G.]

STAAL V. STAAL.

Mr. Joubert appeared for the plaintiff, the defendant being in default.

This was action for divorce brought by the plaintiff, Mrs. Staal, against her husband by reason of his adultery.

Mr. Norman Lacey proved the marriage, which took place 22nd April, 1879.

Mrs. Rosalia C. Staal stated that she was married to her husband in 1879, and lived with him until 1882, when she left him on account of his conduct. She now lived with her mother. In 1886 she petitioned for leave to sue *in forma pauperis*, but proceedings fell through, through her attorney leaving for Johannesburg. The defendant went to Robertson, and she had not lived with him since 1882. He was in town in May, 1890. There were no children.

Abraham Rorich stated he was proprietor of the Clyde Hotel in 1890. He knew plaintiff and defendant well. In 1890 the defendant came to his hotel with a woman (not the present plaintiff), whom he said was his wife. They had two children with them, stayed four or five days, and occupied the same room as man and wife. He did not speak to defendant.

The Court granted the decree of divorce.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 1892.
K.C.M.G. (Chief Justice), Mr. { 80th Aug.
Justice BUCHANAN, and Mr. {
Justice UPINGTON, K.C.M.G.]

CANAVAN V. JOHANNESBURG LIGHTING COMPANY, LIMITED.

Mr. Schreiner, Q.C., and Mr. Shell for the plaintiff; Mr. Juta and Mr. Graham for defendants.

Mr. Schreiner appeared to withdraw this case on a judgment of absolution from the instance being entered. Defendants consented.

Mr. Juta applied for the allowance of Mr. Lance's expenses as a witness. He was managing director, and as such a defendant. He was a material witness. The application had to be made now.

Mr. Schreiner objected, contending it was impossible for the Court to certify that he was a material witness.

The Court refused to make an order, as they could not say whether Mr. Lance was a necessary witness, not having any further information before it.

STIGLINGH V. FRENCH. { 1892. 80th Aug.

Appropriation of payments.

The object of the rule as to the appropriation of payments that the debtor and failing him the creditor must make it at the time of payment is in order that it may still be open to the creditor not to accept it upon the debtor's terms and to the debtor not to make it upon the creditor's terms.

If the course of dealing between the parties has been such that the creditor has been reasonably led to believe that any payment was intended to be imputed to a particular item, and has acted upon that belief, the debtor cannot afterwards claim that the law shall step in to make the appropriation.

Mr. Juta and Mr. Webber appeared for the appellant, and Mr. Schreiner, Q.C., and Mr. Castens for the respondent.

This was an appeal from a judgment of the High Court of Griqualand West, in an action in which the appellant (plaintiff in the Court below) sued the respondent for £99 16s. 10d., balance due for rent of certain premises situate in Market-square, Beaconsfield.

To this claim the defendant pleaded that at the time of the institution of the action, £14 for the current month, viz., March, claimed in the declaration, was not yet due, and that as to the rest of the claim £75 had been paid on account of the said rent on the 3rd March, 1892, leaving a balance due on this account of £10 16s. 10d., which he tendered with full Resident Magistrate's Court costs up to date of tender.

In his replication the plaintiff set forth that besides this matter of rent between the parties he had, before any rent became due, lent the defendant the sum of £100.

He admitted that the defendant made a payment to him on 3rd March of £75, but he said that he (the plaintiff) at the date of the said payment appropriated the said payment on account of the loan of the £100, and that the said payment had no reference whatever to the rent now sued for.

The defendant, in his rejoinder, denied this appropriation, and also the right of the plaintiff to make such an appropriation of the said payment on account of the loan.

The question to be decided was whether the payment of the £75 made on the 3rd March, 1892, was to be taken as appropriated to the loan or to the rent due at that time.

The majority of the Court held (Judge Solomon dissenting) that as there had been no proof of appropriation at the time of payment by either debtor or creditor, the payment must be applied to the most onerous liability, viz., the rent, and that the defendant had in substance established his plea.

Judgment was therefore given for the plaintiff for the amount tendered, viz., £10 16s. 10d., with Magistrate's Court costs only.

From that judgment the present appeal was brought.

Mr. Juta urged that the Judge-President appeared to have ignored all previous correspondence, which clearly showed there was an appropriation.

Mr. Schreiner supported the finding of the majority of the Court below. The appropriation must be at the time of payment in order to rebut the presumption of law. It is left to be an issue of fact. The burden of proof is on the creditor. The books kept should be a leading guide, and they merely show a general account.

The Chief Justice said: I entirely agree with the judgment of Mr. Justice Solomon, who differed from his colleagues in the Court below.

The mistake which, with due respect, I think the Court made was not to attach sufficient weight to the defendant's own letters and conduct before he made the payment of £75. The question raised was whether that payment should be appropriated to the loan debt of £100 owing by the defendant to the plaintiff or to the debt of later date for rent.

The rules as to the appropriation of payments are well known. It is for the debtor and failing him for the creditor to indicate at the time of payment to which of more than one item such payment shall be imputed, and it is only on failure of both that the law steps in to make the appropriation. The debtor and failing him the creditor must declare his intention before or at the time of payment in order that it may still be open to the creditor not to accept it upon the debtor's terms and to the debtor not to accept it upon the creditor's terms (Voet 46, 3, 16). If the debtor's intention has been declared before payment and not withdrawn the creditor would be quite justified in acting upon it, and if he did so act upon it there would be no necessity for any declaration of his intention.

If the course of dealing between the parties had been such that the creditor has been reasonably led to believe that any payment was intended to be imputed to a particular item and has acted upon that belief the debtor cannot afterwards claim that the law shall step in to make the appropriation.

In the present case the correspondence and the course of dealing between the parties clearly show that the defendant intended, or at all events led the plaintiff to believe that he intended, his payment of £75 to be appropriated to the loan debt of £100.

The clear inference from his letters of 31st December, 1891, and 29th February, 1892, is that he regarded the indorsement by himself of the note of £150 for the accommodation of the plaintiff as a satisfaction in full of the loan and that he wished the plaintiff so to regard it. The plaintiff, it is true, did not at first concur in this view, but for the very simple reason that he refused to treat accommodation by way of suretyship for himself as actual payment. He clearly did not object to the principle of applying the first payment to the loan debt. When the accommodation note fell due the defendant paid one-half of it, namely £75, and indorsed a similar note for the balance. Can there be any doubt that if the defendant had paid the full amount of the note the plaintiff would, after what had occurred, been bound to impute the payment to the loan debt? Neither before nor at the time of paying the £75 did the defendant notify any change of intention to the plaintiff. Surely then the plaintiff was justified in treating the payment of £75 as part payment of the loan.

As soon as he discovered that his collector, Klerck, had wrongly appropriated the payment in his books he ordered a correction of the mistake to be made.

The correction was not communicated to the defendant, but this was not necessary, seeing that the original entry had not been communicated to him,

and that the correction was quite in accordance with his own implied direction. I am quite satisfied that it was only when a dispute arose that the defendant thought of making a different appropriation; for his letter of the 24th March, 1892, three weeks after the payment of £75 had been made, is quite inconsistent with his present contention that the payment was intended as a discharge in part of the rent.

I am of opinion that Mr. Justice Solomon was right in holding that the rent claimed by the plaintiff in this action had not been duly paid.

The judgment of the High Court must therefore be reversed and judgment entered for the plaintiff for the amount claimed with costs in this Court and in the Court below.

Mr. Justice Buchanan and Mr. Justice Upington concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinne; Respondent's Attorneys, Messrs. Findlay & Tait.]

VAN ROOYEN V. WERNER. { 1892.
80th Aug.

Minor — Paternal and maternal power — Guardianship—Duty of executor—Master of the Supreme Court.

The plaintiff's mother died intestate without having appointed anyone to administer the maternal inheritance of her minor children.

The defendant and the plaintiff's father were appointed executors dative and an account of their administration was duly lodged with and accepted by the Chief Magistrate of Griqualand East, but the amount of the plaintiff's inheritance was in good faith allowed by the defendant to be retained by the plaintiff's father as natural guardian.

Held, that the plaintiff, on becoming of age, was not entitled to recover the amount of his maternal inheritance from the defendant.

The proper course for an executor under a will by which tutors or trustees are appointed to a minor during the lifetime of his father is to offer to pay the amount of the bequest or inheritance of the minor to such tutors or trustees upon their taking out letters of confirmation as curators nominate. If they refuse or are unable to act he may apply to the Court for the appointment of one or more curators or trustees, or he may pay the money into the Guardians' Fund,

but it would not be safe to pay the money to the father.

Eksteen v. Eksteen's Executors (4 Juta, 13) approved.

Mr. Schreiner, Q.C., appeared for the appellant and Mr. Juta for the respondent.

This was an appeal from a decision of the Acting Resident Magistrate of Kokstad in an action in which the respondent (plaintiff in the lower Court) sued the appellant and others to recover the sum of £158 1s. 8½d., being the amount due to him out of the estate of his deceased mother, C. M. Werner, who died intestate, as shown by the liquidation and distribution account of the executors dative, W. van Rooyen, sen. (appellant), and F. Werner (respondent's father), and accepted by the Chief Magistrate of Griqualand East, acting as Master.

The action was brought against the said executors and their sureties, who had entered into the usual bond for the proper administration of the estate.

The defence set up by Van Rooyen, sen., the executor dative, was:

1. That he had allowed his co-executor, as father and natural guardian of the plaintiff, to retain his maternal inheritance and that having rendered a liquidation and distribution account, as required by law, which account was accepted by the Chief Magistrate, his duties as executor dative had ceased, and that he had met his obligation under the surety bond.

2. That the fact that Frederick Werner, his co-executor (and defendant), and surviving spouse of the late Catherina Margarita Werner, having upon his second marriage entered upon a "Kinderbewys," freed the parties to the surety bond for the proper administration of the intestate estate from all liabilities and obligations under that bond, and, in fact, had the effect of cancelling it.

Provisional judgment was granted against the executors, and failing them, against the sureties. From that judgment the present appeal was brought by Van Rooyen.

The Magistrate, in disposing of the first defence raised, relied mainly on a passage in Tennant's Notary's Manual, page 112, on the duties of executors, on Ordinance 105, section 22, on Burge on Colonial Law, pages 267, 271, 277, and on Grotius, Book i, chapter ix., section 12. With regard to the second defence, he held that the "kinderbewys" had not the effect of cancelling the surety bond, and referred in his judgment to Grotius on Novation, Book iii, chapter 48; Van Leeuwen, page 249; Van der Linden, Book i, chapter 18, section 2, and to Burge on the same subject.

Mr. Schreiner contended that it was apparent the Magistrate had overlooked the distinction between an executor dative and an administering guardian. The duty is to pay the amount to the natural guardian. See Tennant's Notary's Manual, page 122; Ordinance 104, section 6. Payment to the father, the natural guardian, is a full discharge, but when once money is in the hands of the Master the father could not claim it. It was money paid into court, and could not be released without an order, pending the contingency of the minors attaining majority. The father can remain in possession of his child's portion. There cannot be a tutor dative while the father is alive. See "Van der Walt v. Hudson and Moore" (4 J., 327).

Mr. Juta: It was the custom to compel tutors dative to pay moneys into the Guardians' Fund, and not to the parent. There may be a *curator nuncupatus*, and he is bound to pay over minors' portions to the Master. If the father has a legal title he can claim from the Master, but this the Legislature clearly never intended. Ordinance 104, section 38, makes it binding on the tutor dative to account to the Master.

Mr. Sobreiner in reply.

Cur ad vult.

Postea (September 12).

The Court delivered judgment.

The Chief Justice said: This case raises the question of a father's right to administer the property of his minor child, which, strangely enough, has never been decided in this Court. It arises in this way. The plaintiff in the Court below sued the defendant, who was co-executor dative with the plaintiff's father of the plaintiff's mother's estate, for the amount of the maternal inheritance appearing on the executors' distribution account to be owing to the plaintiff. There was no dispute as to the correctness of the account rendered by the executors; the only question to be determined being whether the defendant, having left the plaintiff's inheritance in the hands of the plaintiff's father, and having ten years ago filed an account with the Chief Magistrate of Griqualand East, who, in his capacity as Master, accepted such account, is now liable to pay the amount of the inheritance to the plaintiff upon his becoming of age. The Magistrate of Kokstad, in a very able judgment, held that the defendant was liable, and against that judgment the defendant has appealed. In order to give a satisfactory answer to the apparently simple question now for the first time raised, I have found it necessary to trace the history of our law relating to the paternal power from the earliest times to the present day. Under the early Roman law the

power of a father over the person and property of his minor children was absolute. The father, in fact, was considered to be the owner of his child, and could deal with his person and property as he thought fit. Gradually the powers of the father in respect of his children's persons were abridged, until they were practically as limited as they are in this country at the present day, but his powers over his children's property, although also considerably abridged, remained, as justly remarked by Maine (Ancient Law, page 148), "far ampler and severer than any analogous institution of the modern world." The father still retained the absolute right to acquisitions derived from his own property, but as to acquisitions of the child derived in any other way, the father retained only the usufruct during his own life. It would serve no useful purpose to cite the different authorities of the Dutch law showing the gradual further relaxation of the father's rights and the gradual recognition of the mother's claims in the different provinces of the Netherlands, except in Vriesland, or to refer to the different Colonial statutes, regulations, and instructions which were framed during the Dutch occupation of this colony. The instructions of Governor De Mist, of the year 1804, served as a guide to the old Orphan Chamber until it was abolished by the Charter of Justice, when a new code of regulations was introduced for the guidance of the Master of the Supreme Court, by Ordinances Nos. 108, 114, and 106. In considering what the powers of parents are in this country at the present day, it should be remembered that they exercise those powers subject to the supervision of this Court as the upper guardians of all minors. So long as the authority of parents is not abused, and in the absence of any order of Court declaring them to be prodigals, of unsound mind, or otherwise unfit to have the custody of the person or property of their children, their powers, so far as they fall within the scope of the present inquiry, may be briefly summed up as follows: Firstly, as to the father, he is the natural guardian of his legitimate children until they attain majority. During his lifetime he alone may appoint tutors to take his place after his death during his children's minority (Ordinance 106, section 1). He alone is entitled to their custody, has control over their education, and can consent to their marriage. On the other hand he is bound to maintain them until they can maintain themselves. He no longer enjoys a life interest in any part of their property, but where they have means of their own, either from their own earnings or otherwise, he can recoup himself for his expenses of maintenance out of such means. He has the right to administer their property, but he may lose his right by allowing them to live apart from him and openly to

exercise some trade or calling. Until they have thus been virtually emancipated, or until they become majors, either by marriage or by attaining the age of twenty-one years, he has the management of their property, except such property as has been left to them by other will and placed under a different administration. This, however, is a very important exception. Where a mother or a stranger gives or bequeaths any property to a minor, and appoints one or more curators to administer and manage such property, that would in itself be an indication of the donor's or testator's desire that the minor's father should not be administrator. The same remark would apply where an administrator is appointed under the designation of tutor or trustee. It is true that neither a mother, during the lifetime of her husband, nor a stranger can appoint tutors in the proper sense of the term, but the Court has held in "*Eksteen v. Eksteen's Executors*" (4 Juta, 18) that a person so appointed may take out letters of confirmation as curator nominate. I am of opinion that a person appointed under the designation of trustee might also take out letters of confirmation as curator nominate. If a person appointed either as trustee, or as tutor, or as curator, is unwilling to act, it would still be competent for the Court, upon the application of the Master or other person interested, to appoint a curator to administer property left to a minor by a deed or will which expressly or tacitly excludes the administration of the father. At all events, in each case it would not be safe to hand the property over to the father.

The proper course therefore for an executor under a will by which tutors or trustees are appointed to a minor during the lifetime of his father is to offer to pay the amount of the bequest or inheritance of the minor to such tutors or trustees upon their taking out letters of confirmation as curators nominate. If they refuse or are unable to act, he may apply to the Court for the appointment of one or more curators or trustees, or he may pay the money into the Guardians' Fund on account of the minor. The Master of the Supreme Court administers the fund as an officer of the Court, and payment to him is equivalent to payment into court. But now comes the important question raised in this case, whether the executor is bound to pay the money into the Guardians' Fund where the father has not been passed by, and no one else has been appointed to administer the property either as tutor, or curator, or as trustee. The general practice has been for executors under similar circumstances to pay the money to the Master, but it does not follow that they are bound to do so. The right of a father to bring actions on behalf of his minor children has been repeatedly recognised by this Court. It

property coming to her minor, his estate and effects, of a sum of money, the Master of the the plaintiff's father, as of the Master of the their account with the land East, who should the money that informed that would not be upon the Fund.

of the father m... bona fides; but in the at... any such proof, the debtor paying the father would be fully discharged. Coming next to the mother, her rights of control over the person and property of her legitimate children do not arise until after the death of the father. If he has appointed tutors, those tutors, after being duly confirmed, obtain the guardianship over the person and property of the minors. It is only on failure by the father to appoint such tutors that the surviving mother acquires her full rights. She then has all the powers which the husband enjoyed until his death, and she may then by will appoint tutors for her children to act after her death (Ordinance 105, section 1). Under the 6th section of the Ordinance No. 105, it is not necessary for the Master to take proceedings for the appointment of a tutor dative to any minor being at the time under the natural guardianship of his mother or of a tutor testamentary duly confirmed by the Master. There is an apparent inconsistency in the enactment of the following section, that when it shall become necessary to appoint a tutor dative to any minor, the Master shall, in preference, appoint the mother and one or two more of the nearest male relations. It would have seemed from the 6th section that no tutor dative could be appointed during the mother's lifetime, but reading that section by the light of the 9th, the apparent inconsistency may be explained by holding that where the father has duly appointed tutors testamentary who have since been incapacitated or removed from their office, the mother does not acquire the rights of a natural guardian, and can only be appointed tutor dative in terms of the 7th section. As to illegitimate children, the mother alone, and not the father, is recognised as the natural guardian. We have now to deal with the case of a minor whose mother died intestate without appointing a curator or trustee over the

Mr. Schreiner contended that heirs out of her the Magistrate had over-looked the defendant and between an executor, executors dative, lodged tending guardian. The Chief Magistrate of Griqualand to the natural guardian it without requiring that Manual, page 1, be paid into his hands. I am Payment to the Master of the Supreme Court is a further similar circumstances, have insisted in the money being paid into the Guardians' not. This practice is founded upon the 38rd article of De Mist's Instructions, but those instructions have been expressly repealed by the 46th section of Ordinance No. 105. I am not prepared to say that the Master, as the delegate of this Court in supervising the interests of minors, would not be justified in continuing this practice; but I do hold that where he accepts an account under circumstances like the present the executor is not to blame if he pays the money to the father as the natural guardian of such minors. The defendant's good faith in the matter is not impeached. As executor dative he has allowed the plaintiff's father to remain in possession of his inheritance, and in the absence of any proof of *mala fides* or of any indication of a desire on the mother's part to place the management in other hands, I am of opinion that the defendant is not liable in this action. The judgment of the Court below must therefore be reversed, and judgment entered for the defendant with costs in this Court and in the Court below. In this conclusion both my colleagues concur.

[Appellant's Attorneys, Messrs. Reid & Nephew; Respondent's Attorneys, Messrs. Van Zyl & Buusinae.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, {
K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. 31st Aug.
Justice UPINGTON, K.C.M.G.}]

PROVISIONAL ROLL.

LOUW V. MALAN.

On the motion of Mr. Graham, judgment was granted under rule 829 for the sum of £60 18s 6d.

COLONIAL ORPHAN CHAMBER V. MELVILLE.

Mr. Graham moved for judgment under rule 819 for the sum of £100.

Judgment granted as prayed, and a life policy for £500 already attached declared executable.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted: Johan Carel Winterbach and Jacob Peter Deneys.

TRIAL CASES.

POWELL V. POWELL.

Mr. Sheil appeared for the plaintiff; the defendant in default.

This was an action for judicial separation instituted by Mrs. Isabella McDonald Powell (born Murray), against her husband, Alfred William Powell, by reason of his habitual drunkenness and cruelty.

Mr. Norman Lacey, of the Colonial Office, gave formal evidence of the marriage.

Mrs. Powell, the plaintiff, duly sworn, stated that she was married to the defendant at Cape Town on the 23rd June, 1881. There were four children born of the marriage. At the time of the marriage the defendant was mathematical master of the Diocesan College, Rondebosch. Some five or six months after the marriage, defendant left Rondebosch and went to East London, where he was appointed corresponding clerk in the Railway Department. In April, 1883, on account of his continual drunkenness witness was compelled to leave defendant, and went to Port Elizabeth to reside with her parents; defendant followed her to Port Elizabeth, they afterwards returned to East London, but defendant again neglected and ill-treated witness. Defendant had held several appointments since, the greater number of which he had lost owing to his intemperate habits. Defendant had frequently beaten and otherwise ill-treated witness, and when he was drunk he used very coarse language in the presence of his children. Since July or August of last year, defendant had been almost constantly drunk and had not contributed in any way to the support of witness or the children of the marriage.

By the Court: The defendant, when sober, could easily obtain employment, and would be thus able to pay something towards the support of his children. Witness had no private means.

The Court granted a decree of judicial separation *a mensa et thoro* with costs. The plaintiff to have the custody of the children of the marriage. The defendant to pay ten shillings per month for each child until it attained the age of sixteen. The defendant to have leave to apply to the Court for the custody of the children on giving proof of reformation, and that it would be to the interest of the children that he should resume their custody.

UDEMANS V. UDEMANS.

This was an action for divorce brought by the plaintiff against his wife by reason of her alleged adultery.

Mr. Graham for the plaintiff; defendant in default. Mr. Norman Lacey proved the marriage, which took place on 12th August, 1884.

Andrew D. Udemans stated he lived at Cape Town, and was married to the defendant. They lived together happily until they went to live with his mother-in-law. McMillan used to board there too. He then had disagreements with his wife, as he believed her to have been unduly intimate with McMillan. He assaulted his wife, and had been punished for it. Since coming out of gaol he found his wife was living with McMillan in a house rented by him. There was no one else living in the house. There were two children of the marriage, but he was content to leave them with their mother.

J. D. Woodward stated that he lived in Chapel-street, and knew the parties well. Mrs. Udemans was now living in a house rented by McMillan. They had been there about fourteen months. There were only two rooms in the house, one being a bedroom, which they occupied, and a sitting-room. He had seen them at the house, having been there once or twice. No one else lived there. His wife's sister formerly occupied the house. He knew one room was a bedroom; he had seen a bed in it. McMillan and Mrs. Udemans addressed each other by their Christian names. He had seen them alone at home.

The Chief Justice said the Court would grant the decree of divorce in this instance, but the evidence should be much more direct. In this case it was about the weakest the Court could allow, but as they were satisfied, the decree would be granted.

GENERAL MOTIONS.

BARRENA V. BARRENA.

Mr. McLachlan moved to make absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce, and also for leave to proceed in the said action by edictal citation.

The Court granted the order, and gave leave to serve the interdict with the citation, which would be returnable on November 24, 1892.

In re WESLEY MILLER.

Mr. Graham moved for an order declaring the said Miller a prodigal, and appointing a

curator to administer his estate and effects, and requiring the payment of a sum of money due to him to be made to the Master of the Supreme Court, to be applied towards the maintenance of the prodigal.

From the affidavits it appeared that £100 had been left to Miller by his father. Miller was addicted to drink, and it was alleged would squander this amount.

Wesley Miller, being in court, stated he had no objection to being declared a "prodigal." He understood the nature of the proceedings. He acknowledged he had given way to drink, but had reformed. He would like Mr. Kelly, his son-in-law, appointed curator.

The Court appointed Mr. Kelly curator, with leave to receive the money and apply it in the best manner to the advantage of Miller.

WYNBERG MUNICIPALITY V. TOWN COUNCIL OF CAPE TOWN. { 1892.
{ 31st Aug.

Arbitration—Award—Costs—Act 6 of 1882, section 3 sub-section 14.

Application to have award remitted to arbitrators refused with costs.

Mr. Juta appeared for the applicants, and Mr. Schreiner for the respondents.

Mr. Juta moved for an order remitting the award made in the matter of the Orange Kloof Farm back to the arbitrators for further consideration, or otherwise for an amendment of the said award by declaring that all the costs be paid by the Town Council of Cape Town.

It appeared from the petition of the Mayor of Wynberg that the Municipality of Wynberg are the registered owners of a farm called Orange Kloof, in the Cape division, near Hout's Bay.

That under the powers granted to the Cape Town Council by Act 85 of 1887 the said Council appropriated a stream of water rising upon Government ground, above the said Orange Kloof, and running through it, known as the back, or Hout's Bay, stream, and diverted the same for the purposes of the Cape Town Municipality through the Woodhead tunnel; that they also appropriated about ten morgen of land on the same farm in connection with the said tunnel works, and removed material from the same place.

That the Wynberg Municipality claimed £2,500 from the Cape Town Council for these appropriations—within the time prescribed by Act 85 of 1887, section 5.

That the Cape Town Council offered £50 as compensation for the land and material taken, but tendered nothing for the water.

That the matters in dispute were subsequently referred to arbitration.

That the majority of the arbitrators awarded to the Wynberg Municipality the sum of £250 as and for compensation for water, land, and material taken, in full satisfaction of the matters in dispute, that each party should pay its own costs, and that the costs of the arbitrators should be paid by the Town Council of Cape Town.

The Wynberg Council contended that very great injustice had been done to them, not only by reason of the small amount awarded, but also by reason of each party being adjudged to pay its own costs, seeing that the Cape Town Council only offered £50 as compensation for the land, but made no offer or tender of compensation for the water appropriated, and were adjudged to pay £250 for water and material taken.

Wherefore they prayed that the award might be remitted to the arbitrators.

Mr. Juta contended that under the Land and Arbitration Clauses Act (6 of 1882) the discretion as to costs must be a judicial one, and must be exercised reasonably. The Court can remit the question for reconsideration under sub-section 14 of section 8. The practically successful party has been made to pay costs. Anything wrongfully done is a ground for setting aside an award.

Mr. Schreiner was not called upon.

The Chief Justice said: I cannot help thinking that the applicants have been somewhat hardly dealt with. It is true they made a claim for £2,500, but then they were bound to make some claim, and a substantial amount was awarded to them, and yet they are made to pay their own costs. Such an award is certainly not in accordance with the practice of this Court, and if this had been a case which could be brought on appeal the Court might have been induced to say that this award as to costs was not an exercise of judicial discretion, but there is no appeal in this case from the award of the arbitrators. The question of costs is under the Act referred to the arbitrators. The 14th sub-section enacts that the Court may remit matters referred to the arbitrators for reconsideration on such terms as to costs or otherwise as the Court may deem proper. It is quite true that this section makes it competent for the Court to remit the matter referred to the reconsideration of the arbitrators, and if we had reason to believe that in case of reconsideration the decision in question would be altered, there might be some inducement to remit it. There is no reason to believe that the arbitrators will alter their decision, and if so, there will be only further expenses unnecessarily thrown away. I regret that the applicants did not accept the verdict with a good grace, for now, in order to recover costs, they incur further costs. My own inclination would

be to refuse the application, and make each party pay its own costs, but we must not fall into the error of the same course of action now complained of, and the application must be refused with costs.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinne; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

TADMAN V. TADMAN.

Mr. Schreiner, Q.C., applied for an order to make absolute the rule nisi for dissolution of the marriage subsisting between the parties by reason of the respondent's failure to obey the order for restitution to his wife of her conjugal rights.

Defendant having failed to return, the decree was granted.

In re P. J. DU PLESSIS AND ANOTHER.

Mr. Sheil moved for the appointment of a *curator ad litem* to represent two alleged lunatics in proceedings about to be instituted in the next Circuit Court for Albert, to have them declared of unsound mind and incapable of managing their affairs.

Mr. Frederick Hoffa was appointed *curator ad litem*.

In re ESTATE P. P. HOLST.

Mr. Castens moved for leave to the executrix to raise a sum of money on certain landed property, situated at Green Point, belonging to the estate, for the purpose of effecting necessary repairs to the buildings thereon, the damages having been caused by recent heavy rains.

Leave was granted, allowing applicants to borrow £115 to cover cost of repairs, mortgage, and this application.

ORMEL V. ORMEL.

Mr. Tredgold moved, on behalf of the petitioner, for leave to sue in *forma pauperis* and by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, custody of the minor children, and a monthly allowance in support of the said children.

Matter referred to counsel for his certificate.

In re CAPE STOCK FARMING COMPANY.

Mr. Juta presented the second report of the official liquidators in this matter.

The Court ordered that it should be published like the previous report, and lie open for inspection for a period of two months.

In re ESTATE OF LATE G. F. THOMAS.

Mr. Watermeyer moved for leave to the executrix to raise a loan on mortgage of certain piece of land, part of the garden Rustenburg, Cape Town, for the purpose of putting into repair the three buildings thereon.

Leave was granted, the amount raised to be not more than £150.

In re PETITION OF A. WILSON.

Mr. Tredgold moved to make absolute the rule nisi for amendment of the transfer deed of certain piece of land in the Cape division, near Wynberg, by altering the extent thereof from 1 morgen 442 square roods and 85 square feet to 2 morgen 442 square roods and 85 square feet.

The rule nisi having been duly published and served the order was granted.

In re ESTATE OF THE LATE JOHN BOSS.

Mr. Graham moved for leave to the executrix to sell certain lot of ground marked No. 14, block B.G., situated in King William's Town, the said land being an asset in the estate, but producing no revenue and requiring continual outlay for rates and taxes.

The Court granted the order.

In re JAN M. KUHN.

Mr. Juts moved for the appointment of a curator *ad litem* to the said Kuhn, an alleged lunatic, in proceedings about to be instituted to have him declared of unsound mind and incapable of managing his own affairs, and for leave to take certain evidence in the matter on affidavit.

The Court appointed Mr. Graham curator *ad litem*, and allowed the evidence of the petitioner to be taken on affidavit.

IN THE ESTATE OF THE LATE C. P. PAULSEN.

Mr. Graham moved for authority to the executor and guardian of the minor child to purchase certain farm in the estate known as Celeryfontein, in the district of Fraserburg, on conditions approved by the Master of the Supreme Court.

The order was granted.

In re PETITION J. B. MOOLMAN AND OTHERS :
ESTATE J. B. MOOLMAN AND DECEASED
SPOUSE.

Mr. Tredgold moved for leave to the various beneficiaries in the said estate to have the farms Valkrantz and Elandsfontein, situated in the division of Albert, subdivided, in order that transfer may be passed to each of a defined portion.

The Court granted leave.

In re ESTATE JANTJE UMHLEBI.

Mr. Tredgold moved to make absolute the rule nisi for transfer to Zacharia Umhlebi, eldest son and heir under native law of the deceased, of certain piece of land known as Matyantya farm, situated in the Tambookie location, division of Queen's Town.

By the deed of grant to Jantje Umhlebi the land was granted to him, with no mention of heirs or successors, with the condition that he should not sell nor lease the land granted without the consent of the Government to the proposed purchaser or lessee. The grantee died intestate. Under native law the land would go to his eldest son, but the question was whether it would go free and unencumbered, or subject to the condition prohibiting sale or lease. All the parties interested had been summoned before the Magistrate of Glen Grey, and consented to the land going to petitioner. Government had had notice of the motion.

Mr. Tredgold argued that the land must now go to the heir free of this condition. It was merely a personal one. It prohibited the grantee from selling. He could leave it by will free and unencumbered. Authorities show this must be merely a personal prohibition.

The Chief Justice said it was not necessary to hear counsel any further, and it was not necessary to actually decide the point discussed. The Government had had notice of the application, and they did not appear to object. They were the only persons who could be interested in the transfer of the property, and since it appeared that all those interested as the children of the deceased had consented, the Court would grant the order calling on the Registrar of Deeds to pass transfer to the petitioner of the farm.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, } 1892.
K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] { 1st Sept.

VAN BREDA V. TOWN COUNCIL OF CAPE TOWN.

Evidence—Private Act—Ambiguity.

By a private Act of Parliament the water arising in the "estate O." was vested in the defendants. The body of the Act does not define the limits of the estate, but the schedule, which sets out a deed of submission and award by which the amount payable for the water was fixed by arbitrators, mentions the estate O. as being situated in Table Valley.

Held, that although the original transfer deed of the property includes land P. as being part of the estate O., the intention of the Act was to confine the defendants' rights to that part which is situated in Table Valley.

Held further, that if the Act itself is not sufficient to enable the Court to identify the property, extrinsic evidence is admissible of every material fact which will enable the Court to identify the "estate O." to which the Act refers.

Held further, that if such extrinsic evidence has shown that the description in the Act is alike applicable to two properties, declarations of the parties to the deed of submission and award, to which the Act of Parliament gave a legislative sanction, are admissible to solve the latent ambiguity.

In this matter action was brought upon the following pleadings:

The plaintiff is the eldest son of the late G. H. van Breda and grandson of the late D. G. van R. van Breda. By deed of transfer, dated 18th February, 1861, certain land, called therein the estate Orangericht, was transferred to the plaintiff's grandfather subject to a *fidei-commisum*, in terms of which the plaintiff is the present fiduciary proprietor of the estate. This estate is described in the above deed as consisting of the original garden of Orangericht and the lands adjoining thereto, situated at the foot of Table Mountain, within the Municipality of Cape Town, and a piece of land situate behind Table Mountain, in the Cape district. The original garden and the

adjoining lands are situated in Table Valley, and are known as Orangericht. The other part is known as Oudekraal, and is situated at Camp's Bay. In 1877 the defendants took possession of the springs on Orangericht, on the Table Valley side, and these springs are the same as those referred to in the Act 28 of 1882 and the deed of submission to arbitration. The estate being under a *fidei-commisum*, a Bill was introduced to free the land from the burden and enable the defendants to purchase it. The land referred to was the estate Orangericht as situated in Table Valley. This Bill dropped, and a deed of submission to arbitration about the water-rights entered into. Owing to the *fidei-commisum*, it was agreed that defendants should introduce a Bill into Parliament to relieve a further portion of the estate from the *fidei-commisum*, such portion being within the limits of the Municipality and in Table Valley.

The plaintiff claimed a declaration that the Town Council were only entitled to the water rising on Orangericht situated in Table Valley.

The defendants now claimed to be entitled to the waters of Oudekraal, as being part of the estate of Orangericht. The deed of arbitration referred to "the estate Orangericht, situated in Table Valley."

The defendants excepted to the plaintiff's declaration because (a) it was therein alleged that, according to the title deed, part of the estate Orangericht, known as Oudekraal, was situated behind Table Mountain; (b) because the Act 28 of 1882 referred to the "estate Orangericht"; and (c) by virtue of that Act all water, including that at Oudekraal, was given to the Town Council; and (d) because it was not competent to the plaintiff to override the express provisions of an Act of Parliament by means of reference to previous negotiations and proceedings, and therefore no cause of action was disclosed. A second exception was pleaded on the ground that argumentative and irrelevant matter had been pleaded. Then, as a plea, the defendants denied that Oudekraal had never been known as part of Orangericht, and referred to the plaintiff's title deed. They said that Orangericht was not only that part of the estate situated in Table Valley, and denied that the Town Council had never made claim to the water on Orangericht.

On these pleadings issue was joined.

Mr. Juta and Mr. Webber appeared for the plaintiff; Mr. Schreiner, Q.C., and Mr. Watermeyer for the defendants.

Mr. Juta applied for leave to amend his declaration by adding to the third paragraph the words "and is not at any part contiguous to the garden Orangericht and lands adjoining thereto."

Mr. Schreiner not objecting, the amendment was allowed, subject to the exception generally.

Mr. Schreiner opened the case, and argued his exceptions. When, as a matter of law, a statute disposes of water of a whole estate, and the declaration alleges certain land is portion of the estate, plaintiff cannot say that that part of the land is not included.

The Chief Justice: Can we not construe the meaning of the words "Estate Orangesicht" though we cannot alter the Act? The plaintiff only says his transfer says that the estate Orangesicht includes Oudekraal.

Mr. Schreiner: The best evidence is the registered title. It shows it to be the original garden and a piece of land behind Table Mountain.

The Chief Justice: The Act does not enable us to construe the words. This Court has frequently held that a private Act is merely a statutory contract between the parties interested, and the ordinary rules of construction must apply. The estate Orangesicht is mentioned, but evidence must be produced *alimde* to show what it means.

Mr. Schreiner: The contract must be construed without reference to oral evidence. The second exception is good, as a mass of evidence and irrelevant matter is introduced.

Mr. Juta contended that the words "Estate Orangesicht" were not so clear as to warrant no evidence. The award is attached to the Act, and it refers to the deed of submission, which in turn refers to "Estate Orangesicht," situated in Table Valley. See "Breda v. The Town Council" (6 Juta, 71) as to what the Council considered they were entitled to. Act 29 of 1877 also shows what is meant by Orangesicht.

The Court decided to hear the evidence, and Mr. Juta called

Mr. C. N. Thomas, who stated he was in the Surveyor-General's Department. He produced a plan of properties at Camp and Hout Bay. It showed Oudekraal. He knew Oudekraal did not adjoin Orangesicht. The plan shows the limits of Oudekraal. It is bounded west by private property and south by Crown lands. The top of the mountain, which is Crown land, is between Orangesicht and Oudekraal.

Mr. D. C. de Waal stated that he was a member of the Town Council, and was so in 1879. He remembered the negotiations with old Mr. Breda, and a Bill being introduced.

Mr. Juta stated here that he intended to lead evidence to show what the latent ambiguity in the Act was.

Mr. Schreiner objected; all the negotiations culminated in the deed.

The Chief Justice: But where there is a latent ambiguity, is evidence not admissible to show what the parties meant?

Mr. Schreiner: They must keep to the title. It would be dangerous to allow an interference with these deeds. The schedule to Act 23 of 1882

shows there was a deed of submission. It must be read with the award.

The Chief Justice: We have to construe the words of the Act; in that appears Orangesicht. We want to know what that means, and is there anything in the Act which forces us to refer to the transfer

Mr. Justice Upington: It appears to me it was on the defendants to show that Orangesicht means the Orangesicht of the transfer deed.

Mr. Schreiner: It is the implication; the deed of submission must be considered.

The Chief Justice said it was now apparent that there was a latent ambiguity in the body of the Act, unless the schedule was to be allowed to decide it. The evidence was not quite decisive, and some more would have to be admitted as to what the contract meant.

Mr. De Waal continued his evidence. They discussed the acquisition of water-rights; he did not so well remember 1879, but in 1882 Oudekraal was never mentioned. He did not know it formed part of Orangesicht. He thought that was in Table Valley.

Cross-examined by Mr. Schreiner: He recollected nothing much about 1879. He remembered Breda's deed of renunciation.

Charles Rees stated he was formerly City Engineer, and was so for three years. He remembered the proceedings of the Orangesicht purchase title well. There was no consideration of Oudekraal. The estate Orangesicht referred to this side of Table Mountain. He knew it well. He gauged the water, but there was no gauging at Oudekraal for the Town Council.

Cross-examined: In 1879 they only wanted to acquire the land on this side. Questions were put about water on the other side. The back stream was mentioned. He knew Breda had property on the other side of the mountain. He was not pecuniarily interested in the company just formed.

Re-examined: They do not use any Oudekraal water for Cape Town.

Mr. Juta closed his case.

No evidence was led for the defendants.

Mr. Schreiner urged that the best evidence as to the meaning of Orangesicht was the title-deed. The history of the whole thing must be looked to. In 1879 only land in the Municipality was wanted. The deed fixing the *fidei-commisum* is very important, and should guide the Court. It has never been doubted that Oudekraal was part of the estate Orangesicht. In 1877 it must have been expressly excluded. The documents show that the Council must have had it in their mind. There is, he admitted, no reference to Oudekraal. The evidence does not carry the case any further.

The Chief Justice, in delivering judgment, said: The greater part of counsel's argument for the

defendants has consisted of an attempt to justify them in claiming the water rising on Oudekraal in addition to the water rising on Oranjericht in the Table Valley. I cannot by any means agree with the view that a public body is justified merely because it is a public body in setting up a hopeless and disingenuous claim.

By the first section of Act 28 of 1882 the springs and sources of water on the estate Oranjericht are declared to be vested in the defendants, and the question to be determined is whether or not the terms "estate Oranjericht" were intended to include a place known as Oudekraal.

A property known as Oranjericht is situated in the Table Valley on the north side of Table Mountain and the Oudekraal property is situated to the south of Table Mountain. It is admitted that the two properties are not contiguous to each other. The Act in question is a private Act of Parliament, and its object was to remove an entail existing upon the estate Oranjericht to the extent of allowing the Town Council to acquire the rights to certain water rising on the estate. The preamble refers to a certain award which had been made a rule of Court, whereby it had been decided that the defendants should pay to the plaintiff's father, who was then in possession of the estate, the sum of £700 for the water rights.

The second section enacts that "for the acquisition by the Town Council of the said springs and other sources of water on the estate Oranjericht, and for the right to collect and lead out the waters thereof and for the other privileges as in the last preceding section mentioned in terms of the said award and rule of Court, the said Council shall pay the sum of seven hundred pounds sterling *per annum* to the present proprietor and the future proprietors of the said estate."

The schedule sets out the order making the award a rule of Court. From the order it appears that the deed of submission referred to the "estate Oranjericht" as being "situated in Table Valley."

The schedule having been incorporated with the Act, may certainly be made use of for the purpose of explaining what was meant by the "estate Oranjericht." So using it, I am of opinion that the defendants are entitled only to the water rising on the property situated in Table Valley. It is quite true that the deed of transfer by which the entail was created is also mentioned in the schedule and that the deed refers to the Oudekraal property as being portion of the entailed estate Oranjericht, but the deed is only mentioned for the purpose of saving intact the provisions, conditions and stipulations under which the entail had been created. This incidental mention of the deed for a collateral

purpose cannot override the express statement that the estate Oranjericht, for the use of the water of which the sum of £700 was to be paid, was the property situated in Table Valley.

But assuming, in the next place, that the Act by itself will not enable the Court to decide what property was intended to be included in the "estate Oranjericht," it is clear that extrinsic evidence is admissible of every material fact which will enable the Court to identify the property known by these terms. The evidence thus admitted shows that the terms are applicable indifferently to more than one property, in other words, that the terms have sometimes been used in regard to the whole entailed estate, including Oudekraal, and at other times in regard only to that portion which is situated in Table Valley.

On the face of the Act there is no ambiguity, but when once it appears, from the circumstances admitted in proof, that the property intended to pass is described in terms which are applicable indifferently to more than one thing, evidence of the promoters' intention is admissible to solve this latent ambiguity. The parties to the submission and award to which the Act of Parliament gave a legislative sanction, were the plaintiff's predecessors in title and the Town Council. The correspondence between them clearly shows that neither party ever supposed that Oudekraal was to be included. It was a complete afterthought on the part of the defendants to set up a claim to the additional water when they discovered that the plaintiff was about to sell it to a water company.

No attempt was made by the defendants to prove through the arbitrators or in any way that they had purchased the right to any other water than that which rises in the Table Valley.

The plaintiff is entitled to the declaration for which he prays, and judgment must accordingly be given in his favour with costs.

Mr. Justice Buchanan and Mr. Justice Upington concurred.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendants' Attorneys, Messrs. Fairbridge & Arderne.]

LEAF AND CO. V. TRUSTEE INSOLVENT ESTATE OF LEVINO
BROS. AND CLEGHORN, HARRIS, AND STEPHEN. 1892.
1st Sept.

Insolvency—Ordinance 6 of 1843, section 56—Costs incurred by a creditor in unsuccessful sequestration proceedings and in appointment of a *curator bonis* admitted and allowed to rank—Application to have proof expunged—No order.

Mr. Juta appeared for the applicants, and Mr. Schreiner, Q.C., for the respondents.

Mr. Juts moved for an order to expunge certain proofs of debt filed in the said estate by Cleghorn, Harris, and Stephen, being for costs incurred by them in proceedings instituted for compulsory sequestration of the estate of Levyno Bros., of Uniondale, in which the provisional order was discharged.

The facts are as follows :

The applicants and the second-named respondents are creditors of the insolvent estate of Levyno Bros. At the third meeting of creditors of the said estate, held at Uniondale on the 20th June, 1892, Messrs. Cleghorn, Harris, and Stephen, in addition to other claims, tendered a proof for (1st) a bill of costs amounting to £97 14s. 6d.; (2nd) a bill of costs for £12 2s. 2d. These costs were incurred by the respondents in connection with proceedings taken by them to place the estate of Levyno Bros. under sequestration. The proceedings failed, and the provisional order obtained by the respondents was discharged, with costs against Cleghorn, Harris, and Stephen. (*Vide* 2 O.T.L.R., 88.)

Upon the proof being tendered at the second meeting of creditors Mr. Fichat, a creditor, objected to its admission, but the presiding Magistrate put to the meeting the question whether the claim should be admitted or not. A majority in number and value of the creditors voted that the claim should be admitted, and the Magistrate consequently did admit and rank the claim.

Subsequently the applicants, through their attorneys, Messrs. Fairbridge & Arderne, lodged a protest against the admission of the claim with the trustee, the Magistrate, and the second respondents.

To this protest a letter was received from the respondents' attorney (Mr. Gumpert) refusing to withdraw the claim.

Afterwards, on the 14th July last, Mr. Gumpert wrote a letter to the effect that his clients would be prepared to pay to the applicants the difference between the dividend awarded them by the account as based on the proofs filed, and the dividends which would have been awarded to them if the disputed proof had not been admitted.

The applicants did not consider it proper to accept this offer, but they wrote through their attorneys to the effect that they would accept the proposal if the other creditors who had not voted for the admission of the debt agreed thereto, and if the second-named respondents paid the applicants' costs.

In the present application the applicants opposed the admission of the debt on the grounds that it was not a claim provable against the said insolvent estate, nor did it represent any debts for which the respondents had any moral right to rank upon the estate, inasmuch as the applicants alleged that the respondents' action in placing the

estate under sequestration on insufficient grounds led to delay in the final sequestration of the estate, and as the applicants believed led to considerable loss and damage through the assets of the estate being left in the hands of the insolvents, and through other creditors being enabled in the meantime to issue writs and take out execution against the assets, the costs of which writs were a preferent claim on the said estate.

Mr. Stephen, one of the respondents, in his affidavit denied that the claims by his firm represented merely the legal expenses in sequestrating Levyno Bros.' estate, and alleged that the claims included heavy outlays incurred in the appointment of a *curator bonis* of the assets of the firm of Levyno Bros., which action tended to preserve the assets for the general body of creditors, and that such action was caused through the Resident Magistrate of Uniondale wiring to the Master of the Supreme Court that Levyno Bros., in spite of the provisional order granted against them, were selling and disposing of assets; and further, that the Master urged upon deponent's attorney in Cape Town the absolute necessity of such appointment. He further alleged that in January of this year his firm, being then concurrent creditors of Levyno Bros. for the sum of £526, received a telegram from the said firm saying: "Writs issued; cannot protect you and concurrent creditors unless you sequester us at once." That in pursuance of such telegram, respondents did apply and obtain a provisional order against the firm of Levyno Bros., but on their applying to have such order made final, Levyno Bros. filed a false and misleading balance-sheet, showing that their assets exceeded their liabilities.

The trustee in his report also alleged *inter alia* that the statement rendered to the Supreme Court, when application was made for final adjudication of Levyno Bros.' estate, was false and misleading.

Mr. Schreiner was heard for the respondents, and referred to section 56, Ordinance 6 of 1848. He contended that applicants had no *locus standi* to represent the general body of creditors, and that they could not be prejudiced by accepting the respondents' proposal of 14th July.

The Court made no order on the present application, on the understanding that the amount tendered to the applicants on the 14th July should be paid to them, and also their costs.

[Applicants' Attorneys, Messrs. Fairbridge & Arderne; Respondents' Attorney, G. Montgomery-Walker.]

REGINA V. PAULSE AND ABRAHAMS. { 1892.
1st Sept.

Brothel—Nuisance—Indict b/e offence.

Keeping a brothel in such a manner as to be a public nuisance is an indictable offence at common law.

It is a public nuisance if the inmates and frequenters are in the habit of behaving themselves indecently on the premises in view of the public.

Mr. Graham for the appellants; Mr. Giddy for the Crown.

This was an appeal from a conviction of the appellants by the Resident Magistrate of Cape Town. The two cases were similar.

The accused were charged with the crime of "keeping a brothel which is a common nuisance, in that upon divers days between 15th April and 17th July, 1892, and at (or near) Cape Town in the said district, the said Cina Paulse and Josia Abrahams did wrongfully and unlawfully for gain keep and maintain a certain house with the intent and purpose that women might for hire lend their bodies to the carnal knowledge of divers persons in the said house, in which house certain women did upon divers days between the aforesaid dates so lend their bodies to the great damage and common nuisance of persons there being residing and passing, and thus the said Cina Paulse and Josia Abrahams did commit the crime of keeping a disorderly house for the purpose of fermentation, to the great damage and common nuisance of Her Majesty's subjects."

The accused pleaded not guilty, and denied the right of the Court to entertain the charge now preferred against them as an offence against the Common Law on the following grounds:

(1) That since the cession of the Colony of the Cape of Good Hope, no Superior Court has declared that the law under which the defendants are now charged was adopted or carried out at the time of such cession.

(2) That this law is not binding on the people of this colony unless it was a part of the General Law of Holland at the time of the said cession of the Colony or binding by statute.

The exceptions were overruled and the case proceeded with.

From the evidence, it was clear that the women living in the houses kept by the accused were in the habit of behaving in the most indecent manner in the presence of persons passing by, and that generally the houses were a public nuisance.

The accused were found guilty and sentenced to three months' imprisonment with hard labour.

From this sentence the present appeal was brought.

Mr. Graham argued that it was a question whether the mere fact of keeping a brothel was an offence under our law, though there had been indictments.* He could not but admit that on the evidence the two houses were a nuisance.

The Chief Justice, in delivering judgment said: According to Van der Linden (Inst. 2, 7, 5), the keeping of a brothel is an indictable offence but in his time, as in more modern times, prosecutions for the offence were exceedingly rare except in flagrant cases. In this colony the only cases in which there has been a prosecution have been those where the brothels had become a public nuisance.

The summons in the present case alleged that the accused kept a disorderly house "to the great damage and common nuisance of persons there residing and passing." The evidence fully supported the allegation. The conduct of the men, and women frequenting the brothel was disgraceful and disgusting. Their indecent behaviour was often in full view of the neighbours and of persons passing by, and in this sense was certainly a public nuisance.

I am certainly prepared to hold that even at the present day the keeping of a brothel in such a manner as to create a public nuisance is an indictable offence and that therefore the Magistrate was quite right in convicting the accused. The appeal must be dismissed.

Mr. Justice Buchanan and Mr. Justice Upington concurred.

[Appellants' Attorney, John Ayliff.]

SUPREME COURT

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. 2nd Sept.
Justice UPINGTON, K.C.M.G.]

SCHULTZ V. SPALA.

Poundmaster—Ordinance 16 of 1847, sections 51 and 55—Act 1 of 1869, section 5—Stallion—Illegal impounding—Right to receive money otherwise than as security—Fine—Mistake—Action—Damages—Costs—Appeal.

This matter came on appeal from a decision of the Assistant Resident Magistrate of Glen Grey.

* On 18th July, 1889, in the case of Regina v. John Sinclair the prisoner was tried and convicted in the Supreme Court for keeping a brothel and for assault.—Ed.

The present appellant, defendant in the Court below, the poundmaster at Bolotwa, in the Glen Grey district, was summoned for the recovery of £4 alleged to have been paid under protest. The plaintiff (now respondent) was owner of a stallion horse, which had been impounded by one Prinsloo. The defendant demanded from the plaintiff £4, as and for trespass of the stallion upon Prinsloo's land, refusing to deliver the animal until payment. The plaintiff then paid the money under protest (it was alleged). He also prayed for £5 as damages sustained.

The defendant pleaded he was justified in demanding the money as trespass, the amount having been demanded of him by Prinsloo, and that no protest was made at the time of payment. Further, that Prinsloo should be sued and not the poundmaster, and lastly, that no damage could be proved. An answer to this pleading was filed alleging that the poundmaster had mistaken his duties. He should only have demanded security and allowed the person whose land was trespassed on to bring an action for the special penalty provided for in section 51, Ordinance 16 of 1847.

It was admitted during the trial that the horse had been wrongfully impounded, as the plaintiff had hired the grazing over defendant's farm for his horses. From the evidence it appeared that the stallion in question had been impounded while running on Prinsloo's farm. Plaintiff went to release it, but was told he must pay £4 2s. 6d. He had not enough money, so went back and managed to raise it. He then went and paid the poundmaster (the defendant). The receipt given showed, *inter alia*, "One bay stallion trespass, 80s." Plaintiff asked why it was so much, and the reply was that the law made it so. Plaintiff said although he paid the money he was not satisfied. When the horse was sent to the pound Prinsloo sent a note demanding £4 as penalty. The poundmaster stated that no protest was made at the time of the payment; that the money was paid of the plaintiff's own free will, and instead of offering security the amount was paid. The money was paid to Prinsloo. This, however, was after the plaintiff's agent (Kelly) had demanded it back from defendant. Prinsloo at one time tendered the money back to Kelly, thinking the action was against him as well as Schultz, but finding there was no action against him, refused to give it up. Further evidence was led showing that no formal protest was made at the time plaintiff paid Schultz, but that he was dissatisfied. The Magistrate gave judgment for the £4 claimed with costs, and £8 damages, taking into consideration in this "his personal expenses in appearing at the hearing of the case," but when application was made for plaintiff's expenses as witness he disallowed them. From this judgment the defendant appealed.

Mr. Molteno, for the appellant, submitted that there had been no real protest. The evidence showed there was not. See section 51 of Ordinance 16 of 1847, as to the penalty on trespassing stallions, and section 55; also Act 1 of 1869, section 5. As to security, see "Gray v. Hunter" (Cape Law Journal, vol. 3, p. 89). There was no protest in this case. "White Brothers v. Colonial Government" (2 Juta, 322); "George v. Kimberley Divisional Council" (2 G., 281); "Divisional Council Aliwal North v. De Wet" (7 Juta, 282).

Mr. Juta, for the respondents: The poundmaster had no right to retain the money; all the provisions are merely for security, and he had no right even to take the money. It was trespass money, too, and not merely as security. The release might not have been made before security was given. As to the damages they were evidently given in lieu of witnesses' expenses.

Mr. Molteno replied.

In delivering judgment, the Chief Justice said: When the plaintiff in this case demanded the release of the stallion, the poundmaster would have had no right to refuse if security for the fine had been offered. Instead of demanding security, he demanded money for the trespass. The native went and got the money, and though he made no protest, he was clearly dissatisfied with having to pay the amount. The poundmaster could only have received the money as security for any fine which might be imposed, and it was the duty of the poundmaster to have kept this to abide the result of any action Prinsloo might have brought against the plaintiff for the fine. But the poundmaster paid the money to Prinsloo, under notice, too, from Kelly, plaintiff's agent. He was not justified in so doing, and it appears Prinsloo had no right to impound the cattle, as he had let the ground to the plaintiff. The impounding was illegal, and the plaintiff now claims the money from the stakeholder. It is clear Prinsloo will not bring an action, and the poundmaster was bound to pay the money back. His conduct cannot be justified; the moment he discovered the mistake, he ought to have tendered the money back, and the plaintiff was fully entitled to recover it from him. The evidence as to the £8 damages is very meagre, and the Court will strike that out, and allow the plaintiff his expenses as a witness. There being no evidence as to what these amount to, there is no evidence that appellant has obtained any substantial alteration of the judgment. The action of the poundmaster is altogether so illegal that it is only right he should pay the costs. The appeal must be dismissed with costs, and judgment as to the £8 damages altered as above.

[Appellant's Attorneys, Messrs. Scanlon & Syfret; Respondent's Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT.

(IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, } 1892.
K.C.M.G. (Chief Justice). } 6th Sept.

Ex parte FRAMES.

On the motion of Mr. Castens, Mr. Percival Ross Frames was admitted as an attorney and notary, the oaths to be taken before the Registrar of the High Court.

GOOL V. CORTIS.

Mr. Molteni moved to make absolute the rule nisi for the attachment of 100 bags of ground nuts bought by respondent from applicant for cash, but not paid for, pending an action to be instituted forthwith by applicant.

It appeared from the Sheriff's return that only seventy-eight bags of nuts had been attached, and of these twenty had been delivered to and were claimed by one Alexander Grenelli.

The Court made absolute the rule nisi—the nuts to be returned to the applicant on his finding security—Grenelli to be made a co-defendant in the action to be instituted against the respondent.

In re GIDDY'S ESTATE.

Mr. Castens moved for an order amending the order of Court made on the 8th March last by substituting lots 11 and 27 WB, Goold-street, King William's Town, for lots 11 and 26, Blain-street, erroneously stated in the said order.

The application was granted.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, } 1892.
K.C.M.G. (Chief Justice). } 12th Sept.

PROVISIONAL ROLL.

PETERSON V. FRAME.

Mr. Graham moved for provisional sentence for the sum of £358 12s., which was granted.

LEVIN V. CORTIS.

Insolvency—Writ of arrest—Confirmation.

On the motion of Mr. Molteni, the final adjudica-

tion of the defendant's estate was decreed. Counsel also moved for confirmation of the writ of arrest detaining the defendant in prison until he has submitted to examination in his insolvency proceedings. The affidavit on which the provisional order was granted alleged that the defendant had recently made large purchases of goods, which he had sold considerably under cost price, that he had removed goods from his shop by night, and that it was his intention to leave the Colony with the intention of defrauding his creditors.

Mr. Graham now appeared for the defendant and read his affidavit, in which he denied that he intended to leave the Colony, and alleged that he was ready and willing to attend the meetings of his creditors, and offer full explanation as to his business transactions. He further alleged that in consequence of his being detained in prison he was unable to make arrangements for the finding of bail. Defendant's affidavit was corroborated by his wife.

Charles Kingsley, a teller in the Standard Bank, duly sworn, stated that he remembered the defendant coming to the bank some time ago and asking for a £50 note in exchange for smaller notes. Witness told him that the bank did not issue £50 notes, but that he could have £20 or £10 notes. Defendant asked if the notes were negotiable in the Free State or Transvaal.

Benjamin Levin deposed that he was one of the defendant's creditors and *curator bonis* of his estate. Failing to find out defendant's whereabouts he visited his house and took possession of a number of papers, including invoices, which showed that he had made purchases recently, amounting to £800. The value of the goods found in the shop would not exceed £20. Defendant had also taken all his money from the bank except a balance of 5d.

Defendant then entered the box and adhered to the statements made in his and his wife's affidavits.

Mr. Graham asked that the defendant's bail might be reduced from £250 to £150.

The Chief Justice, in confirming the writ of arrest, said that when a debtor behaved himself as the defendant had done his creditors were quite justified in concluding that he was about to abscond. The facts, as disclosed in the affidavits and evidence, showed that the case was as bad as any that had ever come before the Court. The bail of £250 was not a pound too much. The writ of arrest would be confirmed, costs to come out of the estate.

BOTMA V. FULLER.

On the motion of Mr. Watermeyer, provisional sentence was granted on a mortgage bond for £500.

PLETOHER AND CO. V. HARRISON.

On the motion of Mr. Watermeyer, provisional sentence was granted on two promissory notes for £166 15s. 8d., with interest from the due dates.

UNION BANK, IN LIQUIDATION V. KINGON.

On the application of Mr. Watermeyer, the final adjudication of the defendant's estate was decreed.

TRUSTEES DIOCESE OF CAPE TOWN V. SCHUNK.

On the motion of Mr. Maskew, provisional sentence was granted for £7,500 due on a mortgage bond, with interest at 6 per cent. from 4th May, 1891.

SWANEPOEL V. DE VILLIERS.

On the motion of Mr. Graham, judgment was granted for £100 19s. 2d. under rule 829.

MYERS BROTHERS V. BOLUS.

On the motion of Mr. Jones, judgment was granted for £18 17s. 6d. under rule 829.

BRANDEWYN CO. V. VILJOEN.

On the motion of Mr. Graham, judgment under rule 829 was granted for £25, balance due on fifty shares.

REHABILITATIONS.

On motion from the bar, the rehabilitation of the following insolvents was granted: Andries Petrus Brink, Abraham Leve, William Henry Jarman, and Jan Gabriel du Plessis.

GENERAL MOTIONS.**In re EAST LONDON LANDING AND SHIPPING CO.**

Mr. Graham presented the report of the official liquidators, and asked that the remuneration of the liquidators might be fixed at £50.

The Court granted an order in terms of the report; publication to be made once in the *East London Dispatch* and once in the *Government Gazette*.

COETZEE V. COETZEE.

On the motion of Mr. Molteno, the Court made absolute the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for divorce by reason of his adultery.

In re ESTATE JACOBUS J. BOTHA, DECEASED.

On the motion of Mr. Graham, the Court made absolute the rule nisi for the removal from office of the executrix of the said estate.

In re PETITION OF LOUISA M. NEUGH.

Mr. Graham moved for authority to the executors of the estate of the late Thomas B. C. Bailey to pay to petitioner one-half of the legacy due to her out of the said estate, to enable her to institute proceedings against her husband for divorce by reason of his adultery and cruelty.—The application was granted, and authority given to the executors to pay petitioner the sum of £80, to enable her to institute proceedings for divorce.

SUPREME COURT.

(IN CHAMBERS).

[Before Sir J. H. DE VILLIERS, { 1892.
K.C.M.G. (Chief Justice), and { 20th Sept.
Mr. Justice BUCHANAN.]

ALBION MASONIC HALL COMPANY.

Mr. Giddy presented the second and final report of the liquidators (Messrs. W. E. Moore and C. C. Silberbauer) in this estate, which was as follows: The liquidators beg to report that while all the immovable property and furniture, together with rents collected and balances due on shares, have realised the sum of £1,036 11s., the claims proved against the company and disbursements in connection with the liquidators amounted to £1,007 4s. 8d., which includes the commission of the liquidators, as allowed in the administration of insolvent estates, being a balance of £29 6s. 4d., for distribution among the shareholders of the company who have paid their shares in full, less costs of the second report.

The same order was made as on the presentation of the first report, namely, that it be open for inspection during the usual time.

BENSON V. VAN WYK AND ANOTHER.

Mr. Molteno moved for an order requiring the respondents to deliver to the applicant a certain mare and foal, his property, forcibly seized and taken away by the respondents from a tenant on his farm Rose, in the district of Barkly East.—The order was granted, but not to be final, the respondents to have leave to take any further action concerning proof of ownership.

Re THE MINORS CHIAPPINI.

Mr. Webber applied on behalf of two of the major children of Antonio Chiappini (deceased), for an order authorising the South African Association to pay out of the inheritance due to the four minors of the family the sum of £20 each, in order to meet expenses of maintenance of the children—The order was granted on condition that the Master be satisfied that the money is properly expended, and that the minors have no objection.

SUPREME COURT.

(IN CHAMBERS).

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), and } 1892.
Mr. Justice BUCHANAN.] } 27th Sept.

ADMISSION.**Ex parte DU PLESSIS.**

On the motion of Mr. Graham, Mr. J. L. du Plessis was admitted as an attorney of the Supreme Court, the oaths to be taken before the R.M. Philip's Town.

CADLEY V. CADLEY.

Mr. Graham moved for leave to sue *in forma pauperis* in an action against petitioner's husband for restitution of conjugal rights, failing which for divorce, and custody of the minor child of the marriage.

Matter referred to counsel for his certificate.

WILLMOT V. SILVERSTONE.

Mr. Graham moved for the attachment of a sum of money in the hands of the agents of Joseph Silverstone, *ad fundandam jurisdictionem*, in an action about to be instituted by the petitioner by edictal citation for the recovery of a debt due to him by the said Silverstone.

The order was granted, and leave given to sue by edict, returnable first day of next term; personal service to be effected.

In re ESTATE OF THE LATE HENRY BEVERN.

Mr. Molteno moved for leave to Alfred Bevern, one of the executors of the said estate, to retire from the trust.

The order was granted.

LEACH V. LEACH.

On the motion of Mr. Graham, a rule nisi was granted requiring the defendant to show cause why plaintiff should not be admitted to sue him *in forma pauperis* in an action for divorce by reason of his adultery.

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<i>If the course of dealing between the parties has been such that the creditor has been reasonably led to believe that any payment was intended to be imputed to a particular item, and has acted upon that belief, the debtor cannot afterwards claim that the law shall step in to make the appropriation.</i>	
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<i>By a contract between plaintiffs and defendant the former undertook to supply to the latter a certain quantity of water at the rate of £500 per annum "for a certain period defined in the 6th clause," and by the 6th clause it was provided that the defendant might put an end to the agreement at the expiration of each and every term of five years; provided, however, that not less than twelve months' previous notice to that effect was given to the plaintiffs.</i>	
<i>Held, that the plaintiffs were entitled to terminate the agreement by giving twelve months' notice provided they supplied the water for the defined period of five years at least.</i>	
<i>The maxim expressio unius est exclusio alterius cannot be applied to such a contract for the purpose of holding the plaintiffs liable to supply the water without any limit of time, whilst the defendant is at liberty to terminate the agreement by giving the notice required of him.</i>	
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<i>Held, that although the original transfer deed of the property includes land P. as being part of the estate O., the intention of the Act was to confine the defendants' rights to that part which is situated in Table Valley.</i>	
<i>Held further, that if the Act itself is not sufficient to enable the Court to identify the property, extrinsic evidence is ad- missible of every material fact which will enable the Court to identify the "estate O." to which the Act refers.</i>	
<i>Held further, that if such extrinsic evidence has shown that the description in the Act is alike applicable to two properties, declarations of the parties to the deed of submission and award, to which the Act of Parliament gave a legislative sanction, are admissible to solve the latent ambiguity.</i>	
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"CAPE TIMES" LAW REPORTS.

A RECORD

OF

EVERY MATTER DISPOSED OF IN THE SUPREME COURT,
DURING THE YEAR, 1892, WITH COMPLETE INDEX AND
DIGEST.

EDITED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE
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**JUDGES OF THE SUPREME COURT DURING THE YEAR
1892.**

Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice.)

Hon. Mr. Justice SMITH (Retired, 12th April)

„ Mr. Justice BUCHANAN.

„ Mr. Justice UPINGTON, K.C.M.G.

Attorney-General—**Hon. J. ROSE-INNES, Q.C**

ERRATA.

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"CAPE TIMES" LAW REPORTS.

SUPREME COURT.

(IN CHAMBERS.)

[Before Mr Justice UPINGTON, { 1892.
K.C.M.G.} { 4th Oct.

In re THE MINORS DE WIT.

Minors—Gift—Farms—Undefined Shares—
Change of tenure—Transfer.

Mr. Sheil moved for authority to the father and natural guardian of the said minors to sign the necessary documents to obtain transfer to the minors of the farms Lammers Kraal and Klein-knofffontein, in the district of Prince Albert, in terms of an arrangement for transfer of defined portions made between the owners of these and other farms.

It appeared from the petition that the minors and six other persons held undefined shares in fifteen properties situated in different districts, and it was proposed to alter the tenure and give the minors and one Harmse the two farms above mentioned, in lieu of their one-seventh undefined share in the fifteen properties. The Acting Master had reported on the matter, and had remarked that the properties in question did not appear to have been sold provisionally first, as contemplated in the agreement mentioned in the petition, but were all put up together and sold jointly.

Sir T. Upington: What is the Divisional Council valuation?

Mr. Sheil: It varies from £200 to £4,500. The two farms were valued at £8,000, but they are very much larger than the other farms.

Sir Thomas: I see the Master was not satisfied.

Mr. Sheil: The minors at present hold one-seventh undefined share in fifteen properties all over the country. It is proposed to give them transfer of two compact farms in the division in which they are resident.

Sir Thomas: It all depends upon the value of the farms whether or not that would be to their advantage. The Master is not quite satisfied.

Mr. Sheil: He says so, but he appears to have

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lost sight of the fact that these farms are a pure gift by the grandmother, and that they were to go to the minors.

Sir Thomas: I suppose the grandmother is dead?

Mr. Sheil: No. She has made no affidavit, but she is most anxious that the minors should have these farms. It was on that distinct understanding that she advanced the money.

Sir Thomas: There ought to have been some information in regard to that.

Mr. Sheil: It says so in the father's petition, and the two gentlemen who acted for the grandmother say so. The agreement (4th par.) says that the minors were to get these two farms.

Sir Thomas: But the minors are not bound by that. I think you ought to have some further information as to the value of these farms, and if possible an affidavit from the grandmother to say that she approves of the proposal. It is a very serious thing to deal with the interests of the minors in this way. The application can stand over for further proof of the value of the property proposed to be transferred to the minors jointly with Harmse, and for the approval of the grandmother, by whom the gift of the purchase price is alleged to have been made.

Afterwards on the 21st November the application was granted.

HISKETT V. THE ARGUS COMPANY.

On the motion of Mr. Graham, a rule nisi was granted calling upon the respondents to show cause why applicant should not be allowed to sue them *in forma pauperis* in an action for damages for alleged wrongful demise.

In re ESTATE OF CUTTING.

Mr. Graham, on behalf of the testamentary executrix, applied for leave to the Registrar of Deeds to cancel a lost mortgage bond.

Sir Thomas Upington: The application is peculiar, because it is made by the person to whom the bond was passed.

Mr. Graham: It appears clear that the bond was lost, and there is no trace of any interest having been paid on it since 1871.

Sir Thomas: The petitioner is the executrix testamentary. Why did she not cancel the bond herself? Has the Registrar of Deeds made no report on the matter?

Mr. Graham: No. The Registrar of Deeds could not cancel the bond without an order of Court.

The Court granted a rule nisi, returnable on the 12th instant, calling upon all persons interested to show cause why the bond should not be cancelled; a copy of the rule to be served on Cutting's heirs, one publication in the *Gazette*, and one in the *Cape Times*.

Ex parte FRICKER AND WIFE. { 1892.
4th Oct.

Marriage—Post-nuptial contract—Registration.

Post-nuptial contract allowed to be registered where parties had married with the intention of excluding community, but had omitted to enter into an ante-nuptial contract before the marriage.

Schoombie v. Schoombie's Trustees (5 Juta, 189) followed.

Mr. Juta presented the petition of Wm. C. Fricker and Bessie J. Fricker, who were married in Cape Town on the 20th August, 1892, praying for relief under the following circumstances:

The first-named petitioner, a clerk in the Standard Bank, came to the Colony nine years ago. The second-named petitioner (his present wife) arrived in Cape Town from England on the 17th August, 1892, and three days afterwards the parties were married.

The marriage was entered into on the understanding that community of property should be excluded, but no ante-nuptial contract was executed.

Some few days after the marriage the parties presented themselves at their attorneys, Messrs. Fairbridge & Arderne, with the intention of entering into a settlement which would have the effect of keeping separate the property of the spouses. Mrs. Fricker (who was possessed of considerable means and had further expectations under the will of her father) being under the impression that she was entitled to the benefits of the Married Woman's Property Act, 1882, and that she had full power to administer and dispose of her separate property without any control or interference on the part of her husband.

It was explained to the parties by their attorneys that the marriage having been solemnised, and no ante-nuptial contract having been

executed, the law of community would prevail, and that the wife could not keep her property separate unless the agreement now entered into between the parties would be allowed to be registered as if it were an ante-nuptial contract.

An agreement excluding community was then executed by the spouses and tendered for registration to the Registrar of Deeds; the latter, however, refused to register the agreement on the grounds that there was no provision in the law for its registration.

The petitioners now sought relief.

Mr. Juta: There are several cases where parties intending to marry by ante-nuptial contract, but who, through some mistake, had not entered into a contract before the marriage, were allowed to do so afterwards. It is only a question of evidence. If the Court is satisfied that Mrs. Fricker would not have entered into this marriage except upon consideration that she was to retain her own property for her own use, that is sufficient.

Mr. Justice Upington: I suppose the joint estate has been dealt with by the husband in the meantime?

Mr. Juta: Yes. Of course there would have to be an order saving the rights of those parties who had become creditors between the date of the marriage and the date of the registration. Counsel referred to the following cases: "Twentyman and Another v. Hewitt" (1 Menz, 156) and "Schoombie v. Schoombie's Trustees" (5 Juta, 189).

Mr. Justice Upington said but for the case of "Schoombie v. Schoombie's Trustees" he would have had grave doubt about granting the application, but he thought that that case justified the order being made. His lordship made an order that the Registrar of Deeds be directed to register the contract annexed to the petition, but the rights of parties who became creditors before registration must be reserved.

[Petitioners' Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 1892.
K.O.M.G. (Chief Justice), and Mr. { 12th Oct.
Justice UPINGTON, K.O.M.G.]

REGINA V. DAVID STOFFEL.

Conspiracy to escape from gaol—Act 23 of 1888, section 29—Want of consent—Conviction quashed on review.

The Chief Justice mentioned this case, in which the prisoner was charged with the contravention of the 29th section of Act 23 of 1888 for having conspired and confederated with another prisoner, Andries Plaatjes, to make their escape from a hard-labour party. The evidence showed that the prisoner did suggest to Plaatjes that they should try to make their escape, but no action was taken upon the suggestion. After that they had a quarrel. Before this quarrel, Plaatjes said nothing about the intended escape to the constable or to the gaoler, but after the quarrel he laid information against the prisoner. The Chief Justice said that in his opinion the conviction was wrong. There was no proof of conspiracy or confederacy, as there was no consent on the part of Plaatjes, and consequently no agreement between them; that being an essential ingredient of the crime, as laid down in "*Queen v. Braham*" (1 App Cas., 147). Further, the evidence was most untrustworthy. Plaatjes lay by and said nothing until this quarrel occurred, when he informed the constable. The conviction must be quashed.

REGINA V. JOSIAS ONYERWACHT. { 1892.
{ 12th Oct.

Cattle Thefts (skins)—Act 32 of 1883, section 6—"Conveying"—No identification
Conviction quashed on review.

This was a case in which, the Chief Justice said, a prisoner was charged with contravening section 6, Act 32, 1883, by unlawfully conveying two sheepskins to Riversdale, and was unable to give a satisfactory account of his possession. The evidence showed that the prisoner took the skins to a shop in Riversdale, and sold them there. A month afterwards complainant (James Jackson), who had lost some sheep, went to the shop, and heard from the storeman that the prisoner had sold the sheepskins to him. But there was no identifi-

cation of the skins. A description of the skins was only given. The conviction should be quashed on legal grounds. On the 20th August the skins were brought into the store, and it was only a month afterwards that the charge was laid. Moreover, prisoner was not found conveying these skins in the sense contemplated by the Act. He (the Chief Justice) was not prepared to say, if only a few days had elapsed between the date of conveyance and the date of the arrest, the charge might not have been good. But in this case a month had elapsed. Upon legal grounds, as well as upon the question of fact, the conviction fell through. These storekeepers were very much to blame for the manner in which they bought the skins. The storekeeper here said that when he bought the skins he suspected there was something wrong. Yet, notwithstanding the suspicion, he bought the skins from the coloured man. If storekeepers would exercise a little more caution we should possibly hear less about stock thefts in this country.

KUHN V. KUHN.

De lunatico inquirendo.

Mr. Juta appeared for plaintiff; Mr. Graham, as *curator ad litem*, for defendant.

This was an action brought against defendant to have him declared a lunatic, and to have a curator appointed to look after his person and property.

Dr. Cox, examined by Mr. Juta, said that the defendant Kuhn was under his care in July, 1890, in the Old Somerset Hospital, where he remained for twenty-two days, and was afterwards sent back to Robben Island. While under witness's care he was suffering from chronic mania, being very morose and sullen, and at times burst into great fits of violence, and was most abusive. Witness saw him last on the 8th instant, when he was exceedingly violent, uttering threats, and having delusions as to a Hottentot being under the floor. He did not consider him responsible for his actions.

Cross-examined by Mr. Graham: Witness spoke to him in Dutch. He had never seen him actually commit an act of violence.

By the Chief Justice: He had not entirely lucid intervals.

Mr. Juta, in answer to his lordship, stated that the defendant had about £200 in the hands of the Master.

Dr. Dixon, formerly surgeon-superintendent of Robben Island, and at present in charge of Valkenberg Asylum, said Kuhn was under his charge on Robben Island from October, 1889. At first he was exceedingly melancholic and

dejected, and would stand for any length of time as if he were in a state of hypnotism. Since the defendant had been sent to Valkenberg he had certainly improved.

The Chief Justice: Do you think that he was in his sound mind?—No, I do not think so. I should say he was not responsible for his actions. He might be very dangerous outside the restraining influences of a medical institution.

Cross-examined: He might have some lucid intervals lasting for a few hours, or even a few days.

Defendant, who was in court, stated through the interpreter that he never attempted to strike his mother, that he expected some money from his father's estate, and that it was not he who saw the Hottentot.

The Chief Justice said if the defendant recovered his reason he would have every facility given him of applying for his release. But it would be better for the man himself that he should be kept at the asylum. There was some possibility of his recovering his reason, and if he did the curator of his person would at once report to the Court to that effect. At present he was of unsound mind, although he gave rational answers to questions.

The Court appointed the superintendent of the Valkenberg Asylum curator of his person, and the secretary of the General Estate and Orphan Chamber curator of his property, and gave powers to the curator of his property to apply the funds belonging to the lunatic towards his maintenance at the Valkenberg Asylum.

DE WET V. DE WET.

De lunatico inquirendo.

Mr. Molteno appeared for the plaintiff, and Mr. Giddy for the curator *ad litem*.

This was an action to have the defendant declared of unsound mind and incapable of managing her person and property.

It appeared from the affidavit of the Rev. J. G. Krieger, of Caledon, that the defendant had been insane for the past two years, and that it was desirable in the cause of humanity that she should be removed to an asylum.

It further appeared from the affidavits that the defendant had been chained by the leg to her bed-post for some time.

Mr. J. S. de Wet, brother of the defendant, deposed that his sister had been insane for about two years. She was fifty-two years old. She and her sisters lived together at Caledon. It was found necessary to chain her up, as she was very dangerous at times and had violently assaulted one of her sisters. When she was quiet she was

liberated, but great difficulty was experienced in getting her to return to the house when she was once outside. She was entitled to about £80.

Dr. Dixon, in answer to the Court, stated that he had seen the woman in Church-square that morning. He could not get her to answer any questions. She seemed demented. She was secured to the wagon with a chain round her ankles, but there was no sign that the flesh had been in any way injured. The chain was protected by leather, and had no direct contact with the leg.

The Court declared the defendant of unsound mind, and appointed the superintendent of the Valkenberg Asylum curator of her person, and Mr. Hermannus Dampers, of Caledon, curator of her property.

PROVISIONAL ROLL.

BESTER V. BARNARD.

Mr. Graham prayed for provisional sentence upon a promissory note for £40, made by the defendant in favour of plaintiff.—Granted.

DANVERS' ASSIGNEES V. BEHR.

Mr. Molteno moved for the final order of adjudication of defendant's estate as insolvent.—Defendant appeared in person and said that, though judgment had in 1890 been given against him on a bond, he was insane at the time the bond was passed, and got no consideration.

Mr. Sheil stated that the papers had previously been referred to him, but as the doctor who had attended defendant at the time the bond was passed refused to certify that defendant was insane then, he was unable to certify *probatilis causa*.—The final adjudication was ordered.

HANNAH V. VAN EEDEN.

Mr. Molteno moved for provisional sentence upon an acknowledgment of debt for £47 1s. 6d.—Granted.

HIDDINGH V. BONNES.

Mr. Graham moved for provisional sentence upon an I.O.U. for £600, made by defendant in plaintiff's favour.—Granted.

LIEBERMAN AND BUIRSKI V. EKSTEEN'S EXECUTRIX.

Mr. Watermeyer moved for provisional sentence upon a mortgage bond for £100, with interest from 1st June, 1886.—Granted, and property specially hypothecated declared executable.

VAN NOORDEN V. WRIGHT.

Mr. Molteno moved for provisional sentence upon an acknowledgment of debt for £87 11s, with interest at 8 per cent. from 31st May, 1892, less £1 4s. paid on account.—Granted.

ADMISSIONS.

The Court ordered the following admissions :
Casperus Johannes Truter as an attorney-at-law.

—Mr. Tredgold moved

William Allison Macfadyen as an advocate, the oaths to be taken before the Resident Magistrate of Graaff-Reinet.—Mr. Molteno moved.

Henry Wright Murray as an attorney and notary.—Mr. Sheil moved.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of the following insolvents was granted :

William Thomas Elliott (release from sequestration), Rykie Hester Hoffman, Frans Hendrik Badenhorst, Jan Abraham Augustyn.

GENERAL MOTIONS.

MILLS'S EXECUTORS V. TOWN COUNCIL OF CAPE TOWN.

On the motion of Mr. Molteno, the award of the arbitrators in this matter was made a rule of Court.

HELLABY V. HELLABY.

Mr. Juta moved to make absolute the rule nisi for the dissolution of the marriage subsisting between the parties, by reason of respondent's failure to obey the order for restitution of conjugal rights, and to give the custody of the minor children to applicant, their mother, and declare respondent to have forfeited all rights under the community of property.

The Court made absolute the rule for the dissolution of the marriage. The question of forfeiture to be argued on the first day of next term.

In re THE ALBION MASONIC HALL COMPANY.

On the motion of Mr. Juta, an order was made in terms of the second report of the official liquidator.

IN THE ESTATE OF THE LATE THOMAS CUTTING.

On the motion of Mr. Graham, the Court made absolute the rule nisi for the cancellation in the debt registry of certain mortgage bond passed by Eliza Warren on 17th October, 1861, for £185, in favour of the said Thomas Cutting.

IN THE ESTATE OF THE LATE ISABELLA M. O. DE VILLIERS.

On the motion of Mr. Graham, leave was given to the executor testamentary to raise a loan on mortgage of the landed property in the estate for the purpose of paying out certain legacies and discharging other liabilities, by reason of the liquidation of the Union Bank.

IN THE ESTATE OF THE LATE WM. H. WEBSTER.

Mr. Sheil moved for authority to the executor dative to raise a loan on mortgage of landed property in the estate for the purpose of discharging the liabilities thereof, and enabling the farms to be retained and worked for the benefit of the heirs.

The Court granted the order in terms of the prayer.

VAN OUDTSHOORN V. VAN OUDTSHOORN.

Mr. Molteno moved on behalf of the plaintiff for leave to sue *in forma pauperis* in an action against her husband for divorce by reason of adultery.

The matter was referred to counsel.

IN THE INSOLVENT ESTATE OF THE LATE EDWARD LORENZO CHIAPPINI.

Mr. Juta moved for authority to the Master to pay out to the trustee of the said estate the amount in his hands arising out of the liquidation of the Natal Loan Company in respect of twenty shares registered in the name of the said Chiappini, but of which certificates are lost or destroyed.

The Court granted a rule nisi, returnable on the first day of next term, calling upon all parties interested to show cause why the order should not be granted. One publication to be made in the *Cape Times* and *Argus*.

IN THE ESTATE OF THE LATE JACOBUS J. V. ROUX.

On the motion of Mr. Graham, leave was given to the widow and children of the deceased to enter into an agreement with the

proprietors of the farm Dysseldorp, in the district of Oudtshoorn, in respect of the ownership of certain dam on the farm Rietvlei, the property of petitioners, and to apply the money received in terms of the agreement in reduction of the mortgage bond due by the estate.

GROENEWALD V. GROENEWALD.

Mr. Molteno, on behalf of the plaintiff, moved for leave to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, by reason of his malicious desertion.

The matter was referred to counsel.

HISKETT V. THE ARGUS COMPANY. { 1892.
12th Oct.

Pauper—125th Rule of Court—Counsel's certificate.

Mr. Graham moved to make absolute the rule *nisi* allowing applicant to sue respondents *in forma pauperis* for damages for wrongful dismissal.

The facts upon which the rule was granted as disclosed in the applicant's affidavit were as follows:

The applicant was engaged by the Argus Company on the 20th August, 1892, for a term of six months from the date upon which he should have commenced his duties, to proceed to Kimberley and to serve the company as a newspaper and jobbing machine-minder at a salary of £5 10s. per week of 54 hours, with extra payment for overtime (in terms of a written contract entered into between the company and the applicant.)

On the 28th August applicant entered upon his duties in terms of the contract.

On the 9th September the manager of the company at Kimberley dismissed the applicant without notice.

Applicant alleged that he had suffered damage by such wrongful dismissal and claimed the sum of £150.

Upon these facts a rule *nisi* was granted.

The respondent company now opposed the rule *nisi* being made absolute, on the grounds:

- 1st. That the applicant was not a pauper within the meaning of the 125th Rule of Court, and
- 2nd. Because the applicant was dismissed for utter incompetency, in proof of which facts several affidavits were read.

Affidavits were filed by: (1) J. M. Wilson, secretary to the company, who stated that no copy of the affidavits had been served on him, but only the rule. (2) John Sampson, manager, stated that he engaged applicant to go to Kimberley to take charge of the machine-room. The

applicant attended in answer to an advertisement for a machine-minder. The machine in use at Kimberley is a well-known type of machine. (8) M. P. Tomsett, overseer of machine-room at Richards & Sons, stated that he had engaged applicant to work there as journeyman machine-minder, but that he was quite unfit for his work, and had to be dismissed two or three days after engagement. (4) F. R. Statham, manager of the Kimberley branch of the Argus Company, stated that applicant had been employed in the machine-room at Kimberley, but had proved himself quite incompetent, damaging the machines and implements and causing great delays by his incompetence, and that a machinist had to be called in to put things right. (5) A. F. Creed supported and corroborated Statham.

In reply to these affidavits, applicant stated that he had been engaged as a machine-minder only. That all sorts of additional work outside his contract was given him to do. He explained his leaving Richards & Sons, stating that it was on account of a quarrel with the manager. He had been in Townshend & Co.'s employ before he left for Kimberley, and also produced a testimonial from Unwin Bros., London, stating he was a good, steady workman, doing the best class of work in the machine-room. Mr. Townshend stated that he found applicant a competent machine-minder and steady workman, and that he only left at his own request. He further stated that the work applicant was required to do at Kimberley was quite outside a machine-minder's work. There was no allegation that applicant had endeavoured to gain employment, and on the other hand, the respondents nowhere denied that he was not possessed of £10, or a pauper.

Mr. Graham was heard in support of the rule being made absolute and contended that as there was nothing decisive in the affidavits, but merely strong averments met by equally strong denials, the Court would not go behind counsel's certificate of *probabilis causa*. See "Ormond v. Jordan" (4 B.D.C., 280).

Mr. Molteno, for respondents, contended that if the affidavits were read they would show that applicant was not a pauper. See "La Combre v. Hutchins" (2 C.T.L.R., 64), and "Shakesco v. Van Noorden" (1 C.T.L.R., 121). Applicant is able to earn £300 per annum. He can work, and had the means of obtaining money. "Behrens v. Berg" (7 Buh., 188). The affidavits showed that applicant had been hired as a machine-minder by the respondents for a period of six months at £5 10s. per week. That less than three weeks after he began work he was summarily dismissed for incompetency. He claimed £150 as damages, and asked to be allowed to sue as a pauper, he not being possessed of £10 sterling. The case was

clearly not such a one as was contemplated by the rule of Court.

After further argument,

The Chief Justice said that the Court, while anxious to prevent a denial of justice to anyone of poor circumstances, at the same time wished also to save defendants from harassing lawsuits. In this case the rule would be made absolute on condition that the respondents have leave to apply for costs against the applicant at the trial on showing that he was able to pay or was in a position that he should be able to pay.

[Applicant's Attorney, J. Hamilton-Walker; Respondents' Attorneys, Messrs Van Zyl & Buissinne.]

VARKEVISSE AND ANOTHER V. { 1892.
BARNARD. } 12th Oct.

Mr. Graham applied for an order requiring respondent and his family to quit possession of portions of the farms Diep River and Ringlevelei, in the district of George, the same having been purchased by applicants from the insolvent estate of the said Barnard.

Mr. Juta opposed.

It appeared that the respondent had been entitled to a life interest in one-fourteenth share of the farms mentioned. He became insolvent, and this right was sold to the applicants. Applicants had commenced an action to eject the respondent, but on appearance being entered dropped proceedings, and afterwards proceeded by motion.

Mr. Juta objected to fresh proceedings being taken until the costs of the former action had been paid. He contended that it was in accordance with all practice that where a person commenced legal proceedings and then broke them off before he could take fresh proceedings he must first pay the costs of the former.

The Chief Justice: Any order we may make on the present application will be subject to the payment of costs in the former proceedings.

Mr. Graham said the applicants were ready to tender the costs now. The original idea was to proceed by action, but when the applicants found that they could proceed by motion they stopped at the summons stage. The costs incurred were not large.

Mr. Juta then read the affidavits, from which it appeared that the life interest had accrued under a will, that the farm was held in undivided shares, and that the respondent was only now occupying under leave and licence of his brothers and sisters.

Mr. Graham said that there had been no time to file answering affidavits to those just read, and asked that the case might be postponed until further affidavits could be procured as to what part of the farms was occupied by the respon-

dent, and how the farms were occupied generally by those having a life interest.

The matter was ordered to stand over until 20th November, the applicants in the meantime to pay the costs incurred in the former proceedings.

In re CAPE OF GOOD HOPE BANK, { 1892.
IN LIQUIDATION. } 12th Oct.

Mr. Graham presented the following report of the liquidators and list of compromises. The Court made the usual order. Publication to be made in the *Gazette*, *Cape Times*, *Argus*, and *Zuid Afrikaan*:

Report.

1. In presenting to your Honourable Court a report at the close of the second year of the liquidation, your liquidators deem it desirable to give you a short summary of what has been done, and also of what remains to be done. When the bank stopped payment in September, 1890, there were four branch offices in the Transvaal, eight in the Colony, and one in London, as also the head office in Cape Town. All these branches have now been closed, with the exception of Johannesburg, where an agency is still continued, as there are many debtors throughout the Transvaal whose accounts require constant attention. There were 2,862 debtors' accounts open in the books. Most of these had securities of some kind in connection with the debts. All these accounts have had to be dealt with. Some of the debts were of such a nature that the debtors could be dealt with in a more or less summary manner; others have been nursed, with the result that in many cases a great deal more has been realised than would otherwise have been done, and in some cases full payment will be received where, when first estimates were made, heavy losses were anticipated. In dealing with the Transvaal debtors, your liquidators have been forced into litigation, which has proved not only expensive, but requiring a large amount of careful consideration, and causing anxiety.

2. Some time ago the Nootgedacht Gold-mining Company (Limited) was liquidated and the property was sold at public auction. Your liquidators, being the holders of a mortgage bond upon the property, resolved to buy in same, unless such a price was obtained as would pay the amount of debt and interest. This price was not obtained, and the property was bought in and remained in the possession of your liquidators for some time. About three months ago the property was sold. A portion of the purchase price was paid in cash; a further portion is payable in a few days, and the remainder at four and eight months from 21st October. Upon due payment of purchase price in full, transfer will be given. The result of this

transaction will be that the debt and interest will be paid in full and a profit of £7,748 will be made. This transaction, and that referred to in a former report in connection with the Wesselson mine, will result in a net profit of £18,748, after satisfying in full all legal claims of the bank against these securities.

8. The liabilities of the bank now stand in the books at £2,048,089 18s. 8d. The total number of claims proved and admitted up to the 31st July was 6,442, amounting to £2,087,197 11s. 11d. Of the difference between amount of liabilities and claims proved some £8,904 is for bank notes which have not yet been sent in.

4. Since our last report was presented to your honourable Court on February 5 last, a further dividend of 1s. 8d. was payable on the 16th of May. This makes in all 16s. 8d. in the £, and together with certain preferent claims paid in full, amounts to £1,654,781 16s. 4d., but some £6,967 remains still in the bank uncalled for.

5. The total amount received on account of the call of £80 per share, up to 31st July, was :

From A shareholders ...	£887,468	0	6
From B shareholders ...	5,188	18	5

£892,656 18 11

The original estimate of amount recoverable was £825,000. Your liquidators now estimate that a further sum of £8,825 may be recovered.

6. Your liquidators have made a careful estimate of the value of all assets held by the bank on the 31st July last, shares having been valued at prices current at the time, other securities duly valued, and the amount which may be expected from debtors, upwards of 500 in number, apart from securities, also estimated, and they find the total to be £292,217, which, less expenses, will be available for further dividend, showing about another 2s. 10d. in the £, or in all 19s. 1d. in the £, of which about 8s. 4d. will have been paid from calls on shares and 16s. 9d. from assets.

7. Your liquidators have made out a list of shares held on the 30th June, 1891, with value at prices then current, and also a memo. of sales of shares effected between 30th June, 1891, and 31st July, 1892, and a list of the balance of such shares held on 31st July, 1892, valued at prices current on that date, and find that adding together the amount of sales and value on the 31st July, 1892, the total will show an increased value or profit, as compared with 30th June, 1891, amounting to £69,858 15s.

8. This fact taken in connection with the other fact already alluded to, namely, that the nursing of debtors' accounts has been highly beneficial to the interests of creditors, points to the conclusion that nursing of accounts and careful manipulation of securities are as necessary in the future as in the past. Your liquidators cannot form any

estimate of what time may still be required to bring the liquidation to a close. Arrangements have been made with some debtors to accept payments extending over two or three years, but it will be the object of your liquidators to dispose of all securities and arrange for the payment of all debts as speedy as possible, having due regard to the large interests of creditors and all concerned.

9. Your liquidators hope to be able to pay, another dividend of, say, 1s. 8d. in the £ towards the close of the year, if the realisation of assets proceeds satisfactorily. In the meantime the greater portion of all funds in the Standard Bank bears interest as fixed deposits.

10. Your liquidators would also ask your honourable Court to fix the amount of remuneration hereafter to be paid to them.

(Signed) H. I. FELTHAM, } Official Liquidator
HARRY BOLUS, } of the Cape
JOHN R. REID, } of Good Hope
DAVID MUDIE, } Bank (Limited).

List of Compromises.

Dolman, W. G., Cape Town.—Amount due, £7,850, as shareholder; £4,882, as debtor. Offers £767 14s. 11d. paid, being *pro rata* share of the assets in this man's estate.

Droemer, Isidore, Johannesburg.—Amount due, £102 15s., as debtor. Offers £50 cash, already paid.

Eisenberg, L., Potchefstroom.—Amount due £1,608 18s. 1d., as debtor. Offers to give transfer voluntarily of three properties in Bechuanaland bonded to this bank; in consideration thereof to receive from the liquidators £100 cash, together with a full discharge in favour of the late firm of Eisenberg, Butler & Co., of which this debtor was a partner; the shares pledged to the bank to remain its absolute property.

Howe-Brown, F., Alexandria.—Amount due, £750, as shareholder. Offers £15 cash, already paid.

Green, R. C., Pretoria.—Amount due, £1,145 3s. 11d., as debtor. Offers 2s. in the £ in two promissory notes of £50 and £54 10d., due respectively October 18, 1892, and January 18, 1893, together with all the securities in the bank's possession; release to be conditional on due payment of the promissory notes.

Kennedy, J. H., Johannesburg.—Amount due, £8,675, as debtor. Offers £100, already paid, and all securities in the bank's possession.

Kisch, D. M., Pretoria.—Amount due, £528 2s., as debtor. Offers two promissory notes of £50 each, due September 30, 1892, and December 1, 1892, under guarantee of Mr. G. de Pass; release to be conditional on payment of promissory notes.

Law, John, Kimberley.—Amount due, £1,895 19s. 7d., as debtor. Offers £25 cash, already paid, and all securities in the bank's possession.

Messum, G. B. W., Pretoria.—Amount due, £564 18s. 8d., as debtor. Offers £150 cash, together with certain shares in gold-mining companies, the property of his wife; release to be conditional on these terms being carried out.

Preeler, S. M., Pretoria.—Amount due, £175, as debtor. Offers £100, being ten promissory notes made by Mr. C. A. Celliers, for £10 each, three of which have already been paid; release to be conditional on due payment of remainder.

Stanley, E. J., Tarkastad.—Amount due, £1,639 12s. 8d., as debtor. Offers £200 cash, already paid, and all securities in the bank's possession.

Thesen, Mrs. A. G., Knysna.—Amount due, £780, as shareholder. Offers cash, £26 17s. 8d., already paid, being the balance of proceeds of sale of property situated at Knysna, after bond with interest over same has been paid.

Voss, J. H., Klerksdorp.—Amount due, £414 10s. 8d., as debtor. Offers £200, of which £66 18s. 4d. has been paid, and promissory notes at three and six months handed in for balance, together with certain securities at present of no ascertainable value; release to be conditional on due payment of the promissory notes.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 1892.
K.C.M.G. (Chief Justice), and Mr. { 18th Oct.
Justice UPINGTON, K.C.M.G.]

REGINA V. LOURIE.

Baker's licence—Act 13 of 1870, section 6—
Act 20 of 1884, schedule 2, No. 15—
Alleged contravention—Child under twelve
years old—Conviction quashed on appeal.

Mr. Sheil appeared for the appellant, and Mr. Giddy for the Crown.

This was an appeal from a sentence passed upon the appellant, a lad under twelve years of age, by the Resident Magistrate for the district of Namaqualand.

The appellant and two other European lads, Jan Gagiano and Arnoldus Gagiano, were charged with the crime of contravening Act 13 of 1870, section 6: "That upon the 18th day of August, 1892, and at or near O'okiep, in the district of Namaqualand, the said Jacob Lourie, Jan Gagiano, and Arnoldus Gagiano, one or other or each of them, did wrongfully and unlawfully carry on the trade or calling of a baker by selling to one Hendrik R. van Ellewee a loaf of bread weighing 8 lb. 10 oz. for

the sum of 6d. without having a licence as in that behalf required in terms of tariff marked No. 15 under schedule 2, Act 20 of 1884."

The charge was withdrawn against Arnoldus Gagiano.

The other two prisoners being arraigned pleaded not guilty.

The evidence of Van Ellewee was to the effect that he found the prisoner on the day in question sitting on a bread cart, that he asked him for a loaf, and that on receiving it he paid the prisoner 6d. Further, that the prisoner had stated that the bread belonged to Jan Gagiano.

Jan Gagiano was found not guilty, and Jacob Lourie guilty.

The Magistrate sentenced Lourie to pay a fine of £3, or to undergo fourteen days' imprisonment.

From this sentence the present appeal was brought.

Mr. Sheil was heard in support of the appeal, and contended that the prisoner being a child under twelve years of age the presumption was that he was *doli incapax*, and that the onus of rebutting this presumption was on the Crown.

The authorities were clear that where a child under fourteen years of age committed a crime, even if he were proved to have had an evil intention beyond his years, still he was not to be subjected to ordinary punishment, and *a fortiori* the principle applied where no proof of evil intention was given. (*Vide* Van der Linden, Bk. II., ch. i., sec. 6.)

In the present case, no proof of evil intention was given, and if the Magistrate was of opinion that it was a case which called for punishment, he should have proceeded under Act 21 of 1869, section 2 (the Juvenile Offenders Act).

It was clear from the evidence that the loaf was innocently sold, without any intention to break the law or to defraud the revenue. In any case the alternative of fourteen days' imprisonment was wrong (*"Queen v. Sepongo,"* 4 E.D.C., 271), and the conviction should be quashed.

Mr. Giddy was heard in support of the conviction, and contended that on the evidence of the accused himself there had been a clear violation of the section. The evidence showed that the accused had sold the bread not as agent, but as principal.

The Chief Justice, in delivering judgment, said: In this case they could only deal with the evidence which was given before the prisoner was convicted, and according to that evidence he was a small boy of twelve years old, and was found on a cart belonging to one Gagiano by Van Ellewee, who came to the cart and bought a loaf from him for 6d. Upon this evidence the little boy was charged with exercising the trade of a baker. Now, it was quite true that under the Act the onus was thrown upon the person who sold the bread to show that

he was a licensed baker, but his lordship did not think that that applied to a boy of tender years like this, who was not *sui juris*, and who was merely found in possession of a baker's cart not belonging to himself, but belonging to his elder brother or to his father, and without such a guilty intention as to justify his being found guilty of the charge. If he was told by his elder brother or father to sell bread, he would do so, and he would not know that he should have taken out a baker's licence. Under the circumstances, the child could not be held fully responsible for his actions. The bread did not belong to the child, and all he did was to sell one of the loaves. It seemed that according to the evidence he had sold bread to others; but he did not sell it on his own behalf, but on behalf of Gagliano. It was therefore impossible to hold this child liable for having contravened the 6th section of the Act. He thought the wrong persons were before the Court. There was in his opinion sufficient evidence to justify the conviction of Jan Gagliano. The appeal would be allowed and the conviction quashed.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinne.]

REGINA V. NYAMANKULU AND { 1892.
OTHERS. { 18th Oct.

Native Territories Penal Code—Act 24 of 1886, section 112—Obstructing a headman in the execution of his duty in effecting an arrest—No evidence of conspiracy—Prisoners charged under wrong section—Conviction quashed on appeal.

This case came on appeal from a sentence passed upon the prisoners by the Resident Magistrate of St. Mark's. The charge was that of having committed the crime of contravening section 112 of Act 24 of 1886 (the Native Territories Penal Code), in that the prisoners did wrongfully, unlawfully, and wilfully attempt to obstruct Headman Lindwa in the execution of his duty in effecting the arrest of three persons for a certain crime of assault, and thus and thereby did the said prisoners attempt to defeat and obstruct the administration of the law or other such course of justice.

It appeared from the evidence that a report was made to Lindwa that an assault had been committed and he went out to arrest the three persons charged. Having arrested them he passed a kraal where the three accused were, they came out and threatened him and his son with sticks. These three called to the boys he had arrested to run away and fight. Lindwa became frightened

and allowed the prisoners to escape. The accused were now charged as above, were found guilty, and sentenced to pay a fine or undergo six months' imprisonment in default of payment.

Mr. Juta, for the appellants, contended that they were clearly charged under a wrong section. Section 112 did not apply, and there was no evidence to bear out the charge under that section. Section 117 governs the crime of rescuing prisoners.

Mr. Giddy was heard in support of the conviction and whilst admitting that the prisoners had been charged under the wrong section, contended that the Court had more than once held a conviction good under similar circumstances where although the prisoner had been charged under the wrong section yet in the body of the indictment the facts of the offence were clearly set out. He cited *Regina v. Russouw* (7 C.T.L.R., 226.)

The Chief Justice, in delivering judgment, said the prisoners in this case were charged with the contravention of the 112th section of the Native Territories Penal Code. That section provided that "whoever conspires with any person to obstruct prevent or defeat the course of justice, or who wilfully attempts, in any way not otherwise criminal, to obstruct, prevent, pervert, or defeat the course of justice or the administration of the law shall be punished as in the last section provided." The punishment there mentioned was very severe—seven years, or flogging or whipping, or with a fine, and in a case where death had resulted from false accusations, even the punishment of death might be inflicted under the 111th section. In the present case there was no charge of conspiracy. Therefore the first portion of the 112th section did not apply. The charge was that of wilfully attempting to obstruct, prevent, or pervert or defeat the course of justice. To attempt to defeat the course of justice was not punishable under the 112th section unless it was not "otherwise criminal," and therefore if any other section of the code provided for the punishment of this offence, then the 112th section was not applicable. Now, the 157th section was, in his (the Chief Justice's) opinion, the section under which the three prisoners ought to have been charged. The 157th section provides that: "(a) Whoever assaults any person with intent to commit an offence, or to resist or prevent the lawful apprehension of himself or of any other person for any offence, or to rescue any person from lawful custody; or (b) assaults, resists, or wilfully obstructs any peace officer in the execution of his duty, or any person acting in aid of such officer, shall be punished with imprisonment or fine, or both." If the indictment had set out the necessary words of the 157th section, sub-section (b), then it might be contended that no injustice was done to the prisoners, inasmuch as the body of the

indictment stated what crime practically was committed, but in point of fact the words of the 157th section were not followed. The indictment charged the prisoners with wilfully attempting to obstruct; it was not the offence mentioned in the 157th section. In the indictment the "wilful attempt" alleged was not obstruction of a peace officer in the execution of his duty, but attempting to obstruct and defeat the administration of the law. Now, in his (the Chief Justice's) opinion the Magistrate entirely mistook the meaning of the section. There was no contravention of the 112th section. It was intended to apply to a different class of cases. There was a contravention of the 157th section, and under that section the prisoners ought to have been charged. Inasmuch as the section was wrongly stated, and inasmuch as the crime laid down in the 112th section was of an entirely different nature from that in the section under which the prisoners ought to have been charged, providing for much severer punishment, the prisoners ought to have been discharged, and the conviction must therefore be quashed.

Sir Thomas Upington concurred, and said that in his opinion it would be a very serious thing to hold that where a magistrate had proceeded definitely under one section (112), afterwards the crime; as laid under another section; (157) should be held to be the offence with which the prisoners were charged, that section possibly laying down altogether a new class of crime.

Conviction quashed, appeal allowed.

[Appellants' Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT.

(IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, { 1892.
K.C.M.G. (Chief Justice), and Mr. {
Justice UPINGTON, K.C.M.G. } 18th Oct.

Ex parte GARLAKE.

Mr. Sheil moved for the admission of Mr. John Storr Inglesby Garlake as an attorney-at-law and notary public.

Mr. Garlake took the oaths and was duly admitted.

VAN OUDTSHOORN V. VAN OUDTSHOORN.

On the motion of Mr. Molteno, a rule nisi was granted calling upon defendant to show cause why plaintiff should not be allowed to sue him *in forma pauperis* in an action for divorce by reason of his alleged adultery.

CLARK'S ZOUTPANSBERG EXPLORATION COMPANY V. PALMER.

Mr. Graham, on behalf of defendant, applied for leave to sign judgment against the plaintiffs in the suit instituted against him by reason of their failure to proceed therein.

Counsel remarked that two terms had elapsed since the issue of summons, and submitted that defendant was entitled to the relief afforded by the rule of Court.

Mr. Juta opposed the motion, and contended that defendant could gain nothing by the present application except judgment for absolution; whereby plaintiffs would be put to additional costs in instituting new proceedings.

The Chief Justice: I think the defendant is entitled to the benefit of the rule of Court, and judgment must be given as prayed.

GROENEWALD V. GROENEWALD.

On the motion of Mr. Molteno, a rule nisi was granted calling upon defendant to show cause why his wife should not be allowed to sue him *in forma pauperis* in an action for divorce by reason of his alleged adultery.

SUPREME COURT

(IN CHAMBERS.)

[Before Mr. Justice UPINGTON, { 1892
K.C.M.G. } 25th Oct.

ADMISSIONS.

Ex parte DE SMIDT.

Mr. McLauchlan moved for the admission of Mr. Abraham Andrew Muller de Smidt as an attorney, notary, and conveyancer.

Mr. De Smidt took the oaths, and was duly admitted.

Ex parte ALING.

Mr. Sheil moved for the admission of Mr. Johannes Eliza Bode Aling as a notary and conveyancer.

Mr. Aling took the oaths, and was duly admitted.

GARDINER V. BRINKHUIS.—*Ex parte* { 1892.
SCHOLTZ. { 25th Oct.
Attachment—Notice of withdrawal—High
Sheriff—Rule nisi.

Mr. Juta moved for authority to the Sheriff to withdraw notice of the attachment of certain one-third share in four erven in Block E, situated at Somerset West, in the above suit, the plaintiff therein having failed to take any further proceedings since August, 1887, and his present address being unknown, and the said land having since been sold to one Josua G. H. Scholtz, who is unable to obtain transfer by reason of the said attachment.

This was the petition of P. E. Scholtz and J. G. H. Scholtz. It appeared from the petition that the first-named petitioner is the holder of a mortgage bond for £50 upon certain one-third share in four erven in Somerset West, passed by one Brinkhuis in his (petitioner's) favour on the 10th September, 1884.

That in March last Brinkhuis intimated to the first-named petitioner that he had sold the property to the second-named petitioner for £50, and that upon transfer being given the second petitioner would pay the amount of the bond to the first petitioner.

That the Registrar of Deeds refused to allow transfer, on the grounds that the High Sheriff had on 31st October, 1887, given him notice that the said landed property had been attached in the suit of Gardiner v. Brinkhuis.

That on the 12th August, 1887, Gardiner obtained judgment in the Supreme Court for the sum of £6, whereupon a writ was issued against the movables, to which a return of *nulla bona* was made, and thereafter a writ was issued against the immovable property above described, since which date no further action was taken by Gardiner.

The attorneys of Gardiner refused to withdraw the writ, and direct communication with Gardiner could not be obtained, as his present address was unknown. Last April the second petitioner sold the property in question to one Daniels, who was now pressing for transfer.

The Court granted a rule nisi calling on Gardiner to show cause why the Registrar of Deeds should not be allowed to pass transfer as prayed, notwithstanding the said attachment. Service to be effected by one publication in the *Gazette*. In case of no notice of cause to be shown be given to the Registrar of the Supreme Court on or before the first day of next term, the rule to become absolute.

IN THE ESTATE OF THE LATE JOHN { 1892.
J. P. JAMESON. { 25th Oct.
Executors—Removal at their own request.

Mr. Juta moved for leave to two of the

executors testamentary of the said estate to resign their trust; one being unwilling, and the second unable on account of winding up of business, to attend thereto; and for the appointment of the South African Association and Alan B. Gordon in their stead.

The testator appointed as his executors his wife, his brother Samuel Watson Jameson, and the secretary of the King William's Town Fire and Marine Assurance and Trust (Limited), now the Frontier Assurance and Trust Company. The estate has been liquidated, and the proceeds handed to Mrs. Jameson, who has a life interest under the will. Mr. S. W. Jameson is out of the jurisdiction, and declines to act any longer. The Frontier Assurance and Trust Company has ceased to carry on its business, and is now being liquidated. Under these circumstances the Court was now asked to relieve Mr. S. W. Jameson and the secretary of the company in liquidation, and to appoint in their place the South African Association and Mr. Alan B. Gordon.

Counsel referred to Ordinance No. 104, section 21, and to "*In re Miller's Estate*" (1 C.T.L.R., 84).

Mr. Justice Upington said that the sole difficulty was the removal of the executors testamentary.

Mr. Juta pointed out that they could be relieved without freeing them of any liability incurred up to the date of their retirement.

The Court granted an order that the two executors be removed as prayed, but the operation of the order to be suspended pending the appointment of new executors, for which purpose the Master was directed to take the necessary steps in terms of Ordinance No. 104; saving all rights of the heirs as against the late executors in connection with their administration of the estate.

In re THE ESTATE OF ISMAIL { 1892.
SAFODIEN. { 25th Oct.

Death notice—Application for leave to file—
Insufficient proof of death.

Mr. Juta moved for authority to the Master to accept and file the death notice and will of the said Safodien, it being alleged that he was a passenger on the steamer Deccan, which left Mauritius on the 9th February last for Bombay, and has not since been heard of, and is believed to have been lost.

It appeared from the petition of one Baderoen Abrahams, executor testamentary under the will of Ismail Safodien, that the latter left the Colony in December, 1891, for Mecca, via Mauritius and Bombay; that he took a passage and embarked in the steamship Deccan at Mauritius for Bombay;

that the Deccan left for Bombay on the 9th February, 1892, and had not since been heard of. Application was made to the Master of the Supreme Court for leave to file the will and also the death notice, but the Master declined to accept the same without an order of Court. The petitioner now prayed that the Master might be directed to accept and file the will and death notice, and grant him letters of administration as executor testamentary to the estate of the said Ismail Safodien.

Mr. Juta was heard in support of the petition, and contended that the evidence was sufficient to raise a presumption that Safodien was dead. He cited "*Dormehl v. Morrison's Executors*" (7 Juta, 152).

The Court held that the evidence was not sufficient, and made no order on the application. Leave was given to make another application if further evidence of the loss of the Deccan could be produced.

In re GROENEWALD'S ESTATE. { 1892.
25th Oct.

Mr. Graham moved, on behalf of Pieter Christian Groenewald, executor testamentary and one of the heirs of the said estate, for authority to raise a loan of £60 on six houses in the said estate, for the purpose of paying off certain rates due on the same and for effecting certain necessary repairs to the property. The testator, by his will, dated 10th December, 1889, left the six houses in question to the petitioner and his five brothers and sisters, subject to a life interest in one of the houses to one Sarah Adams. He also directed that another house should be occupied by petitioner and his brothers and sisters, the rents to be derived from the other four houses to be paid to the heirs, all the property being subject to a *fidei-commisum*, under which it could not be sold or mortgaged. The property, which has depreciated through non-repair, at present yields a monthly rental of £5 10s. There is due on the property the sum of £22 15s., water and other rates, and it is estimated that £25 will be required to effect the necessary repairs. To cover these expenses authority was now asked from the Court to raise a loan of £60. All the heirs had consented to the loan being raised.

The matter was ordered to stand over for further information as to why the repairs had not been effected by persons in beneficial occupation.

Afterwards on the 1st November the Court sanctioned the raising of the loan of £60 as prayed on being satisfied that the petitioner and his brothers and sisters were not in a position to pay the claims against the property or to undertake the execution of the necessary repairs.

In re O'GBADY'S PETITION.

On the motion of Mr. Graham, the Court made absolute the rule nisi giving petitioner leave to pass transfer of certain property acquired by her own exertions since her husband deserted her.

SUPREME COURT.

(IN CHAMBERS.)

[Before Mr. Justice UPINGTON, { 1892.
K.C.M.G. } 1st Nov.

Ex parte HONEY.

Mr. Graham moved for the admission of Mr. William Streak Honey as an attorney and notary. The order was granted, the oaths to be taken before the Registrar of the High Court.

Ex parte HEROLD.

Mr. Sheil moved for the admission of Mr. Charles Willoughby Herold as a conveyancer. The order was granted, the oaths to be taken before the Registrar of the Supreme Court.

GENERAL MOTIONS.

In re ESTATE JACOBUS A. EKSTEEN, DECEASED.

Mr. Graham moved for leave to the executrix testamentary to dispose of certain perpetual quitrent land in the district of Swellendam, the property of the estate, for the purpose of discharging the liabilities thereon, and making the best provision possible for herself and her daughters.

The petition was referred to the R.M. of Swellendam for his report.

Ex parte BIGGS. { 1892.
1st Nov.

Mr. Sheil moved for leave to petitioner to raise a loan of £300 by mortgage of the farm Oude Muur, in the division of Middelburg, of which petitioner's wife has a life usufruct.

The petitioner and his wife were married in community of property in 1868, of which marriage there has been issue nine sons, one of whom is a major, the others being minors. The parents (now deceased) of petitioner's wife by their will, dated 6th October, 1868, bequeathed to their daughter (Mrs. Biggs) the farm Oude Muur, burdened with the following *fidei commissum*: that she should

enjoy the usufruct of the said property, and after her death that it should pass to her eldest son then living; and by a codicil to their will the testators gave the life usufruct to the petitioner in the event of his surviving his wife, the property to pass to his eldest son then living. Transfer of the property was passed to Mrs. Biggs in 1878, and since that time the petitioner has expended the following sums on the land: £46 for survey of the property; £24 transfer dues; £80 for the erection of a dwelling-house; £70 for the making of dams, and £53 for fencing; in all, the sum of £278. Petitioner has recently had heavy losses in stock, and he now prayed for authority to raise a loan of £800, and to pass a bond for that sum in favour of the person or institution advancing the money under hypothecation of the landed property aforesaid, to reimburse him the amounts expended as aforesaid, to assist him in providing for his family, and to pay his liabilities incurred on their behalf, and to pay the costs of the present application, and the expenses in raising the loan and passing the bond. The petition was submitted to the Master, who reported *inter alia* that, as Mrs. Biggs was still living, it was for the Court to say whether the consent of her present eldest son was sufficient to warrant the raising of the loan.

The Court authorised the raising of a loan of £200 by mortgage of the property in question, and expressed the opinion that satisfactory evidence had not been given that the items of expenditure, £80, £70, and £53, had been actually incurred.

In re THE PETITION OF MARION { 1892.
E. C. MASON. { 1st Nov.

Marriage in community—Husband—Desertion—Legacy devolving on wife—*Ex parte* Faure (8 Juta, 115) followed.

Mr. Graham moved for authority to the executors of the late T. B. C. Bailey to pay out to petitioner the legacy devolving upon her from the estate, she having been deserted by her husband, to whom she is married with community of property, and left in poor circumstances with a family to support.

From the petition it appeared that petitioner's husband deserted her in 1890, and left her without any means of support for herself or her three children. That she had become entitled, as a legatee under the will of the late T. B. C. Bailey, to the sum of £165. That the money was in the hands of the General Estate and Orphan Chamber, as one of the executors of Bailey's estate, and that they refused to pay the legacy to her without an order of Court. She now prayed that an order might be granted authorising the secretary of the

General Estate and Orphan Chamber to pay over to her the legacy above referred.

The Court, following "*Ex parte Faure*" (8 Juta, 115), granted a rule *nisi* calling upon petitioner's husband to show cause, on the 21st November, why one-half of the legacy should not be paid to petitioner, and the other half devoted to the maintenance of the children of the marriage. The Court further ordered the secretary of the General Estate and Orphan Chamber to forthwith pay to petitioner the sum of £15 to meet her immediate needs.

SUPREME COURT.

(IN CHAMBERS.)

[Before Mr. Justice BUCHANAN.] { 1892.
8th Nov.

In re UNION BANK, IN LIQUIDATION.

Mr. Juta moved for the sanction of the Court to the following list of compromises:

Mrs. Helena Maria Honey (born Le Sueur), a contributory on thirteen shares, offers a cash payment of £450 in settlement of the liability; £290 has been deposited, and the balance will be paid on acceptance of the compromise.

Estate Widow I. S. de Villiers, a contributory on ten shares. The executors offer the sum of £1,252 4s. 5d, which has been deposited, together with cession of claim on Paarl Bank, being together, taking claim on Paarl Bank at par, the amount distributed by them as per liquidation account filed. The deposit in the Paarl Bank formed portion of the funds administered by the executors for certain heirs, and was specially deposited to their credit.

Estate Gabriel H. Joubert, a contributory on five shares and twenty-one shares in the Paarl Bank. The executors offer a cash payment of £150 for liabilities to this bank, guaranteed by J. P. Retief.

M. Rabinowitz, a contributory on thirty-six shares in this bank and seven shares in the Cape of Good Hope Bank, whose estate has been sequestrated, offers through his father, the Rev. J. Rabinowitz, the sum of £100 to this bank for the release of his estate from sequestration; payment to be made seven days after compromise is accepted.

F. S. B. Maskew, a contributory on fifteen shares, offers £150 for his liability. Seventy pounds has been paid, and the balance is to be paid in monthly instalments of £5, bearing interest

at 5 per cent. Two of these instalments have been paid in.

Francis J. Webster, a contributory on 200 shares in this bank (£10,500 paid on account), and on 125 shares in the Cape of Good Hope Bank (£1,060 paid on account), offers the sum of £20,000 for his liabilities to both banks, payable thirty days after acceptance of compromise, and divisible *pro rata* on the claims of the two banks at that date. The liabilities of the firm of Webster & Co., which at the stoppage of the bank amounted to £9,280 8s. 9d., have been paid with interest.

L. H. Twentyman, a debtor for £50,176 14s. 4d. (exclusive of interest) on a claim originally of £72,828 2s., offers £200 for his liability. The liquidators suggested an offer of £500, but the debtor intimated through his attorneys that he could not offer more than £200. The liquidators still think that net less than £500 should be accepted.

Mr. Juta remarked that with regard to this last case, he thought that Mr. Twentyman would be represented by counsel.

Mr. Justice Buchanan: The Court cannot sanction a compromise, the terms of which have not yet been settled.

There being no objections, the Court sanctioned all the above compromises except Twentyman's.

In re CAPE OF GOOD HOPE BANK, IN LIQUIDATION.

Mr. Graham moved for the sanction of the Court to the following list of compromises:

Charles Cowen, Johannesburg, owes £5,560 8s. 9d. as debtor and £5,000 as guarantor, offers £100 cash, already paid, together with all securities in the bank's possession.

James Lang, Johannesburg, owes £5,000 as guarantor, offers £500, of which £100 has been paid, balance in quarterly instalments of £66 13s. 4d.; release to be conditional on due payment of these instalments.

F. J. Webster owes as shareholder £2,604 9s. 11d., and makes same offer as in case of Union Bank.

The Court sanctioned the compromises.

SUPREME COURT

(IN CHAMBERS).

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.] { 1892.
15th Nov.

IN THE ESTATE OF THE LATE JAN HENDRIK MALAN.

Mr. Juta moved for authority to the executors testamentary to appropriate the amount deposited in the Guardians' Fund to the credit of the minor heirs in the said estate in reduction of the claim of the official liquidators of the Paarl Bank in respect of eleven shares registered in the name of the said Malan. Counsel stated that the motion had already been postponed for further information. There were five heirs in the estate, and each of them received a grand paternal inheritance of £211 7s. 2d. One died, leaving minor children, and his share was paid into the Guardian Funds'. The executors in the estate, who had to pay the calls of the liquidators, compromised with the bank for £1,066. The father apparently died before the testator Malan, and the grandchildren stepped into the shoes of their father. He could not say who was guardian of the minors.

The Chief Justice said the minors ought to be represented. If they had no guardian someone must be appointed to speak for them. The matter must be allowed to stand over for notice to the persons representing the minors. If they had no proper tutor, notice must be given to their mother.

IN THE ESTATE OF JACOBUS A. EKSTEEN. { 1892. 15th Nov.

Mr. Graham moved for leave to the executrix testamentary to dispose of certain perpetual quitrent land in the district of Swellendam, the property of the estate, for the purpose of discharging the liabilities thereon, and making such provision out of the proceeds as may be possible for herself and daughters. He further stated that it appeared from the facts disclosed in a former petition that the petitioner and her husband executed a joint will in 1876. The will provided that the survivor should have the usufruct of the property, but that it should not be mortgaged or sold. Petitioner's husband died, leaving five children—two majors and three minors. The wife was appointed executrix under the will, and she came to court in 1882 (there not being sufficient movable property in the estate to pay the debts connected with it) and applied for leave to mortgage the property in the estate to pay the debts. The Court granted an order

authorising her to pass a mortgage for £100. The present petition set forth that petitioner had been unable to pay the interest on the £100, and that provisional sentence had been taken out against her, and that the property had been attached. Since then she had received an offer from a friend to advance £100, provided an order was made allowing her to remortgage the property.

The Chief Justice said his difficulty was that if petitioner could not pay interest on £100, how was she going to pay it when they increased the bond?

Mr. Graham said the total amount required would only be £150—that included the interest and costs incurred.

The Court authorised the passing of a bond to cover the amount (£100), together with interest and costs incurred in the motion for provisional sentence and in the present application.

TABLE BAY HARBOUR BOARD v. METROPOLITAN AND SUBURBAN RAILWAY. { 1892.
15th Nov.

Arbitration—Award—Mistake—Admission of arbitrators.

On application to have an award, whereby two arbitrators awarded certain compensation to the applicants for land expropriated by the respondents, made a Rule of Court, being opposed on the ground that the award was based upon a mistaken belief on the part of the arbitrators that the whole of the land was free from any burthens or conditions, whereas in fact it was discovered after the award that there was a prohibition against building upon a small portion of the land.

Held, that a mistake of fact not being admitted by both the arbitrators did not invalidate the award, and that even if it had been so admitted, the respondents could not object to the award inasmuch as it was through their want of diligence that the prohibition was not brought to the notice of the arbitrators.

The Attorney-General (Mr. Rose Innes, Q.C.) moved to make the award of the arbitrators in respect of certain land at the back of the Breakwater Cottages, acquired by respondents for railway purposes, a rule of Court.

The Metropolitan and Suburban Railway Company, acting under the statutory powers conferred upon them by Act 28 of 1889, section 6, took for railway purposes the piece of ground above referred to, being in extent forty rods.

As the company and the Harbour Board could

not agree as to the value of the land, the matters in dispute were submitted to two arbitrators (Captain Jackson and Mr. Tonkin).

The arbitrators awarded the Harbour Board the sum of £350.

The deed of submission contained the usual clause that the award should be made a rule of Court, and application was now made to that effect.

Mr. Juta, on behalf of the Railway Company, opposed on the grounds that the land in question was held under two deeds, one of which contained a clause that upon one portion of the ground (one-twelfth of the whole) no building should be erected. They said that this restriction had not been noticed by the arbitrators, nor had they taken it into account in awarding the sum of £350. The Railway Company therefore objected to the award being made a rule of Court. On this fact being brought to the notice of the arbitrators, one of them expressed a desire that the award should be referred back to them, and filed an affidavit to that effect. There was no affidavit from the other arbitrator (Captain Jackson). Mr. Juta contended that there was a vast difference between a piece of ground in Cape Town which could be built upon, and a piece which could not be built upon. The Harbour Board had an encumbered title, and, as a matter of fact, they got compensation for an unencumbered title. The arbitrators had made a mistake and the award should be referred back to them for reconsideration.

The Chief Justice, in giving judgment, said: An award once published cannot be altered by the arbitrator on his own authority alone, even if as remarked by Voet (4, 8, 28) he alleges that he has made a mistake.

But the Court has the power to refer a case back to the arbitrator, and when the case is so referred back it would be quite competent for him to reconsider his award. If there has been misconduct, such as corruption or manifest partiality, on his part, the Court would set aside the award without referring it back to him.

The same course would be adopted if his award is based upon so gross a mistake of fact or of law as could not have been made without some degree of misconduct on his part. If the arbitrator admits he has made a mistake of law or of fact and is prepared on that ground to review his own decision, the Court would refer the award back to him.

But if the mistake was occasioned through the want of diligence of one of the parties to the arbitration in not bringing to the notice of the arbitrator any material fact which such party knew or had the means of knowing, the Court ought not to interfere even were the arbitrator to admit that the knowledge of the fact would have

induced him to make a different award. In the present case there were two arbitrators. They have not both admitted by affidavit that they made a mistake, and this in itself is a sufficient answer to the respondents' objection to the award. But even if both arbitrators had admitted their mistake there is a further answer to the respondents' objection.

The deed of transfer upon which the applicants' title is founded shows on the face of it that they are not entitled to alienate a small portion of the expropriated land for building purposes, and that deed was before the arbitrators.

The respondents had ample opportunity to inspect the deed and it was their duty, if the arbitrators overlooked the condition, to bring it to their notice.

It was the respondents' own want of diligence which occasioned the mistake, if mistake there was. The finality of an award should, if possible, be maintained, and if the party complaining of a mistake is himself to blame for it, the Court ought not to relieve him.

The application to have the award made a rule of Court will therefore be granted with costs.

[Applicants' Attorneys, Messrs. J. H. Reid & Nephew; Respondents' Attorneys, Messrs. Wessels & Standen.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, (K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.) 1892. 21st Nov.]

KAFFRARIAN COLONIAL BANK V. SCHUNKE.

On the motion of Mr. Thorne, the final adjudication of the defendant's estate was decreed.

DALY V. KELLY.

Mr. Thorne moved for the final adjudication of the estate of Thomas Herbert Kelly.

Mr. Juta, for defendant, said if he were allowed a little more time he would be able to pay all debts in full. Although there was a judgment for the amount of plaintiff's claim against defendant, there was immovable property which was quite sufficient to pay the debt, and consequently the defendant was not insolvent.

The Court allowed the matter to stand over to enable the defendant to raise a mortgage on his landed property.

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Afterwards on the 15th December, as it appeared that the debt had not been paid, the final adjudication of the defendant's estate was decreed.

MERRIMAN V. MEARS.

Mr. Sheil moved for provisional sentence on a mortgage bond for £1,000, with interest at 6 per cent. from 1st January, 1892.

Provisional sentence granted, and property declared executable.

HIDDINGH V. DE VILLIERS AND VAN DER BYL.

Mr. Thorne moved for provisional sentence on a mortgage bond for £2,400, with interest at 5 per cent., against the two defendants; and against the first defendant for £4 6s. 6d., being the amount of premium on a fire policy; and against the first defendant for a further 1 per cent., interest on the above bond, as per agreement.

The Chief Justice, in granting provisional sentence, remarked that the extra 1 per cent. claimed under the agreement was not to have preference in competition with other creditors.

STELLENBOSCH BANK V. MYBURGH.

On the motion of Mr. Graham, provisional sentence was granted for £500 on a promissory note.

VAN NOORDEN V. BOTMAN.

Mr. Webber moved for provisional sentence for £82 10s., due on a promissory note.

Provisional sentence granted.

WILMAN, SPILHAUS AND CO. V. LOTTER.

On the motion of Mr. Oastens, judgment was granted, under Rule 829, for £108 17s. 7d., being the balance on an account for goods supplied.

BOTMA AND MARITZ V. WEGH.

On motion by Mr. Moltano, judgment was granted under Rule 829 for £8 18s. 3d. with interest from 1st January, 1891.

OHLSOON'S CAPE BREWERIES V. RODWELL.

On the motion of Mr. Juta, the final adjudication of the defendant's estate was decreed.

MUSGROVE V. MUSGROVE. { 1892. 21st Nov.]

Mr. Moltano appeared for the plaintiff; the defendant in default.

This was an action for restitution of conjugal rights, failing which for divorce.

Martha Musgrove, the plaintiff, deposed that she was married to the defendant on 4th November, 1885. She lived at Worcester before the marriage, and after the marriage on the Wynberg Flats. Her husband was a farmer. They did not live happily together, because her husband had such a violent temper. After eighteen months' residence on the Flats, her husband went to Millwood Goldfields, where they remained for six months. She then went to Worcester, as her mother was dying. The last time she saw her husband was in May, 1888, at Worcester. He went back to Knyana, and she subsequently heard from him that he was leaving for Johannesburg. She had never heard from her husband since. She had tried to find out his whereabouts but had failed. Two children were born of the marriage, and one of them was dead. She was willing to return to her husband. She was anxious to have the custody of the child. If her husband would be prepared to support her, she would go back to him. She herself supported the child, and had not received any assistance from her husband since his desertion.

The Court granted a decree for restitution of conjugal rights, the defendant to return to or receive plaintiff on or before the last day of term, or to show cause by 12th January, 1892, why a decree of divorce should not be granted; the joint property to be divided, and plaintiff to have the custody of the child of the marriage.

[Plaintiff's Attorney, C. C. Silberbauer.]

REHABILITATIONS.

On motion from the bar, the following insolvents were granted their rehabilitation: Abel Hendrik Brasmas, Casparus Johannes A. Smuts, Albertus Wynand Gideon van der Westhuisen, Andries Stephanus Jacobus van der Walt, Jesse Shaw, Stephanus Fredrik Kloppers, Adriaan Johannes Visser, Gideon Jacobus Pienaar, Maurice Rabinowitz, Hendrik Adriaan Meintjes, and Richard William Nelsen.

Ex parte PILGRAM. { 1892.
21st Nov.

Insolvency—Ordinance 6 of 1843, section 117.

Where the largest creditors (the official liquidators of the Union Bank) in an insolvent estate declined to sign their consent to the insolvent's discharge, on the grounds that they had no power to do so, but intimated that they would not oppose the application,

the Court ordered the matter to stand over the application to be renewed if the liquidators subsequently consented to the insolvent's discharge.

Mr. Searle moved for the discharge of the insolvent under the 117th section of the Ordinance 6 of 1843.

The estate was voluntarily surrendered on 16th December, 1890. The schedules showed:

<i>Liabilities</i> ...	...	£53,888 18 8
<i>Assets</i> —Landed property, £2,800; }		
Other property £12,098 18s. }		£15,898 18 0

Deficiency ... £37,490 0 8

The trustee's report was favourable to the insolvent.

Before applying for his discharge the insolvent wrote the following letter to the official liquidators of the Union Bank:

St. Andrew's Square,
Cape Town,
16th September, 1892.

Gentlemen,—As it is almost two years since I surrendered my estate for the benefit of my creditors, I would be obliged to know, whether you, as the largest creditors therein, are now agreeable to sign the consent for my rehabilitation.

I remain, Gentlemen,
Your obedient servant,
B. PILGRAM.

To this the insolvent received the following reply:

Cape Town,
17th September, 1892.

Dear Sir,—Replying to your letter of yesterday we regret that we are advised by counsel that we have no power to sign any consent to rehabilitation, but we should not oppose any application you might make to the Court in the matter for relief.

Yours faithfully,
G. W. STEYTLER,
H. GIBSON.

The Master certified that three-fifths in number of the creditors who had proved debts against the estate had testified in writing their consent to the discharge of the insolvent being granted.

Counsel was heard in support of the application, and contended that although the liquidators appeared to be under the impression that they had no power under the Winding-up Act to consent to the discharge of the insolvent, still their letter of the 17th September was sufficient consent within the 117th section.

The Court held that the terms of the 117th section had not been complied with and ordered the matter to stand over until the 81st instant; if in the meantime the consent of the liquidators could be obtained, the application might be renewed.

[Messrs. J. & H. Reid & Nephew, Attorneys for the Applicant.]

Ex parte PRETORIUS. { 1892.
21st Nov.

Insolvency—Costs—Security—Practice.

Mr. Molteno moved for the rehabilitation of the insolvent. The estate was voluntarily surrendered on the 18th July, 1888. The liabilities according to the schedules amounting to £1,836 1s. and the assets estimated according to the schedules to £1,415 19s., leaving an estimated deficiency of £420 2s.

The trustee in his report questioned the bona fides of some of the insolvent's transactions with property belonging to his estate. He was examined on the subject but no further action was taken in the matter.

The application was refused, with leave to apply again in three months.

Mr. Molteno asked for an expression from the Bench as to the practice with regard to giving security in cases under the Act of 1884.

In the present case the Registrar had refused to set the case down unless the applicant's attorneys gave security for £25 for costs of opposition.

Mr. Molteno: Under Act 15 of 1859, section 5 and the rules of Court framed under that Act provision was made for giving security.

Act 88 of 1884, section 14, repeals the Act of 1859 and the rules framed under it and whilst specifically repealing the security clause makes no provision in lieu thereof, it merely re-enacts the 117th section of Ordinance 6 of 1843.

In *Ex parte* Tritsch (6 Juta, 245) the question of security was not raised.

The Chief Justice said: Before the passing of the Act of 1859 an insolvent could only obtain his rehabilitation by obtaining the consent of a certain proportion of his creditors. The effect of the Act of 1859 was to allow an insolvent to obtain his rehabilitation without their consent.

Although that Act had been repealed, yet the Court had granted rehabilitations without the consent of creditors in terms of the old Ordinance. It was quite in the power of the Court to say that an insolvent should not apply for his discharge until he had given security.

Finding security was a very wholesome practice, and the Court saw no reason to disturb it.

[Applicant's Attorneys, Messrs. Scanlen & Syfret.]

Ex parte BROLE. { 1892.
21st Nov.

Bond—Executrix testamentary—Registrar of Deeds.

Mr. Tredgold appeared for the petitioner.

This was the petition of Petronella Maria Brole who, with William Edward Prynn, was appointed executrix testamentary by the will of her husband, Joachim Peter Brole, who died on 24th January, 1887.

The other executor testamentary (Prynn) died in September, 1889.

On the 17th April, 1885, and about two years prior to his death, the said J. P. Brole bought from Charles William Brole the farms "Kleinleeuwfontein" and "Plaatshuis," situate in the division of Bedford, for the sum of £2,350 and paid in reduction of the said purchase price £900, leaving a balance of £1,350, represented by a bond on the said farms in favour of the Mutual Life Assurance Society, which it was agreed the said Brole should take over in settlement of the balance of the purchase price.

The said J. P. Brole died before transfer was completed in his favour of the said farms, which still remained registered in the name of the said Charles William Brole.

Petitioner was anxious to have transfer completed to the said estate, as it was without security for the amount of the purchase price already paid.

The directors of the South African Mutual Society had given their consent to the estate taking over the said bond of £1,300.

The movable assets in the estate were valued at £1,478, but the petitioner wished to retain these, as they formed the only means of livelihood for herself and her family.

By the joint will of petitioner and her deceased spouse the survivor was appointed sole heir subject to an obligation to sell and divide the estate equally with the children in the event of remarriage.

Petitioner was advised that as executrix of the estate of her late husband she could not pass a bond without an order of Court.

Wherefore she prayed that the Court might be pleased to grant an order authorising her as executrix testamentary to the estate of the late J. P. Brole to take over the existing bond of £1,300 on the farms "Kleinleeuwfontein" and "Plaatshuis" in settlement of the balance of the purchase price thereof by passing a fresh bond in favour of the South African Mutual Society for the sum of £1,300 under hypothecation of the said farms.

The Registrar of Deeds informed the Court that he saw no objection to the course proposed to be adopted, as he drew a distinction between the

present case and that of *In re Brown* (7 Juta, 287.)

The Court made no order, the Chief Justice remarking that as the Registrar of Deeds had expressed himself ready to allow this bond to be passed, he did not think the Court could interfere.

[Applicants' Attorneys, Messrs. Fairbridge & Arderne.]

THOMAS V. THOMAS.

Mr. McLauchlan moved to make absolute the rule *nisi* for the dissolution of the marriage subsisting between the parties by reason of the respondent's failure to obey the order for restitution to his wife of her conjugal rights.

The Court made the rule absolute.

IN THE MATTER OF THE MINORS BORICH.

Mr. Watermeyer moved for authority to the father and natural guardian of the minors to pass a mortgage bond for £700, secured by hypothecation, of the farm Groote Zeekoegat, in the district of Albert, petitioner being about to transfer the said property to his children as a gift, and it being a condition that the existing mortgage bond of like amount shall be taken over as a liability thereon.

The Court granted the order.

PETITION OF JURIE JOHANNES STEYN.

For leave to sue *in forma pauperis* in an action against Daniel J. Steyn and others for recovery of damages in respect to their interference with the rights of petitioner's wife to a life interest in the farms Klipplaatfontein, Longkloof, and Rietpoort, in the district of Aliwal North.

The papers were referred to Mr. Joubert.

IN THE ESTATE OF THE LATE JOHN BARNETT.

Mr. Sheil appeared for petitioner, and moved for the removal as executors of the said estate of the Frontier Insurance and Trust Company (Limited) on account of retirement from business, and for the appointment in their stead of the Colonial Orphan Chamber, of Cape Town, and Alan Bell Gordon, of King William's Town.

The Court granted the order, the Master to take the necessary steps under Ordinance 104, section 21.

HISKETT V. ARGUS PRINTING COMPANY.

Mr. Molteno moved for the issue of a commission to examine the witnesses resident at Kimberley on behalf of the defendants.

The Court consented, on the understanding that the trial took place on the 6th December. Mr W. B. Wright was appointed commissioner.

LEACH V. LEACH.

Mr. Graham, for petitioner, moved for leave to sue *in forma pauperis* and by edictal citation in an action against her husband for dissolution of the marriage subsisting between them, by reason of his alleged adultery. The defendant was not heard of in the Transvaal.

The Court granted the order, the citation to be returnable on the first day of next term, one publication in the Johannesburg Star and one in the Government Gazette.

MACKIE, DUNN AND CO. V. KEITH { 1892.
AND CO. AND BOCCONI.—IN RE { 21st Nov
THE BARQUE AVANTI SAVOIA.

Ship—Cargo—Pledge—Foreign law—Interdict—Sale.

The master of a disabled Italian ship which was abandoned and sold at the port of Algoa Bay, having landed the cargo consisting of deals, which was being conveyed from Moulmein to Devonport, gave notice through his agents to the applicants as representatives of the owners of the cargo at the above port, to the effect that, unless the full amount for which he had pledged the cargo to such agents were forthwith paid he would proceed to realise the cargo.

Held, that, inasmuch as the amount so claimed included many items of disbursements, which had no connection with the preservation of the cargo, and the applicants had tendered a sum which on the face of the account appeared reasonable, the applicants were entitled to interdict the sale of the cargo pending an action to be brought by them to have the pledge set aside.

This was an application to make absolute a rule *nisi* (granted on the 31st October) which operated as an interdict restraining the respondents from selling the whole or portion of the cargo of the abandoned barque Avanti Savoia.

The applicants are Port Elizabeth merchants, Liloyds' agents, and the representatives of Messrs. Wallace Brothers, 8, Austin Friars, London, the owners of the cargo in question, and the holders of the original bills of lading.

The facts are as follows :

The Italian barque *Avanti Savoia*, whilst on her voyage from Moulmein to Devonport, laden with a cargo of teak logs, met with severe weather and suffered damage, consequent upon which she put into Algoa Bay on the 18th August last.

The barque was subsequently abandoned and sold, and the cargo landed, and now lies on the Harbour Board depositing ground at Port Elizabeth.

On the arrival of the ship in Algoa Bay, Keith & Co. were appointed agents by the master, Felice Bocconi.

On 29th August the captain pledged to Keith & Co. the cargo as security for disbursements, &c., and gave that firm an irrevocable power to sell the same in certain events.

The applicants alleged that this pledge was given not to secure a debt or liability already incurred and owing, but to afford security for a debt which it was contemplated would be incurred.

The pledge was given without the owners of the cargo being communicated with, and was given to ensure not only such liability as the owners of the cargo would be responsible for, but also all expenses for which the owners of the vessel would be liable, although neither the vessel nor her freight were pledged thereby.

The respondents submitted that by the law of Italy (which law they contended governed the contract) it was not necessary to give the owners of the cargo notice of the pledge, which notice was peculiar to the law of England, but that if it was necessary to do so it was impossible to give notice, as they (the respondents) were ignorant as to who the owners were, as their names neither appeared on the charter party nor in the bills of lading, the latter being made out "to order" only.

By letter dated the 23rd September last the applicants were appointed the representatives of Wallace Brothers, and authority was given them to take charge of the cargo, and for that purpose the original bills of lading were sent to them.

Acting upon their instructions Messrs. Mackie, Dunn & Co. demanded from the respondents delivery of the cargo against payment of the portion of the expenses incurred for which they considered the cargo-owners liable, namely, the sum of £2,000, together with an undertaking to pay such further sums, if any, as might, on average being adjusted, be found due, and also to pay distance freight.

The respondents refused to deliver the cargo, except upon payment of the sum of £3,158 9s. 9d., being the total sum alleged to have been disbursed in respect of both ship and cargo.

Messrs. Keith & Co., in a letter to the applicants dated 27th October, threatened that unless the full amount of £3,158 9s. 9d. was paid by 31st October, they would avail themselves of their

rights under the deed of pledge, which letter the applicants construed as meaning that the respondents intended to sell the cargo or a portion thereof.

They alleged that, if such sale were permitted, irreparable loss and damage would be sustained by Wallace Brothers.

On these facts, supported by affidavit, the applicants applied for an interdict restraining the sale of the cargo pending an action to be brought by them individually and as agents of Wallace Brothers.

On 31st October a rule *nisi* was granted, which operated as an interdict.

The Attorney-General and Mr. Juta now moved that the rule *nisi* be made absolute.

Mr. Searle and Mr. Shell appeared to oppose, and contended that under the circumstances the master was justified in pledging the cargo, and that the pledge was valid.

The following cases were cited: "The Gaetano and Maria" (7 L.R.P.D. 187); "The Karnak" (2 L.R.P.C. 505); and "Thomson, Watson & Co. v. Wieting and Others" (The *Formica*), (2 Juta, 197). Counsel also referred to "MacLachlan on Shipping," p. 189.

The Attorney-General was heard on the question of costs.

The Chief Justice said: Assuming the Italian law to regulate the rights of the master of the ship, I am by no means satisfied that he was justified in pledging the cargo under the special circumstances of this case. But assuming further that a pledge of the cargo was justifiable, it is not alleged that by Italian law it can be allowed to cover expenses which were not incurred for the preservation of the cargo.

The deed of pledge omits to state, as it ought to have done, the amount for which the cargo had been pledged.

The account furnished to the applicants, however, shows the amount to be £3,158.

This account however, includes many items which could clearly not be charged against the cargo. The amount which may be fairly charged against the cargo does not appear to me to be more than that which was tendered, namely £2,000. Notice having been in effect given to the applicants, as representatives of the owners of the cargo, that unless the full amount claimed was paid the cargo would be sold, they obtained from a judge in chambers a rule interdicting such a sale. The question now is whether the rule should be made absolute.

Unless such a rule had been obtained it would have been in the power of the master to sell the cargo and pay the other respondents the full amount claimed by them notwithstanding the applicants' tender to pay the £2,000 upon delivery to them of the cargo and to give security to pay

such further sums as might, on average being adjusted, be found to be due and also to pay distance freight.

After that tender the respondents ought to have withdrawn their notice, and the rule must, therefore, be made absolute with costs, continuing the interdict pending an action to be brought to have the pledge set aside.

[Applicants' Attorneys, Messrs. Fairbridge & Arderne; Respondents' Attorneys, Messrs. Van Zyl & Buissinne.]

IN THE MATTER OF MINORS DE WIT.

Mr. Sheil moved for authority to the father of the minors to sign the necessary documents to obtain transfer to the minors of the farms Lammer's Kraal and Kleine Knoffelfontein, in the district of Prince Albert, in terms of an arrangement for transfer of defined portions made between the owners of these and other farms.

The application was granted.

THE WAR DEPARTMENT v METRO-
POLITAN AND SUBURBAN RAIL-
WAY COMPANY. { 1892.
21st Nov. &
19th Dec.

Land — Expropriation — Sale — Transfer —
Interdict — Rule *nisi*.

The Attorney-General moved to make absolute the rule *nisi* for an interdict restraining the respondents and the Registrar of Deeds from passing transfer of certain land near the Amsterdam battery, formerly belonging to the War Department, and expropriated for railway purposes only, in terms of the deed of transfer to the said company.

Mr. Juta, for the company, opposed the rule, and contended on the authority of "Landmark v. Van der Walt" (8 Juta, 800), that the applicants were out of court.

The Attorney-General was heard in support of the rule.

The Chief Justice said he hoped no injustice would be done by continuing this interdict for a short time; but they were not inclined to extend it longer than the last day of term. If no action was brought meanwhile then applicants would have to apply to continue it beyond the last day of term. Of course it would lapse then if an action was not brought, or if an application was not then made for further extension.

On the 19th December the interdict was by consent allowed to continue until the 12th January, 1893.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinne; Respondents' Attorneys, Messrs. Wesels & Standen.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 1892.
K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G. } 22nd Nov.

JAMPIES V. JAMPIES.

Mr. Juta moved for an order to restrain the respondent and the Registrar of Deeds from passing transfer of certain land or withdrawing certain moneys from the Post-office Savings Bank pending an action to be brought by plaintiff for divorce on account of defendant's adultery.

The Court granted an interdict restraining respondent from transferring any land belonging to him, or withdrawing any deposit from the savings bank, pending an action to be brought to trial this term for divorce, the costs to be costs in the cause.

HISKETT V. ARGUS COMPANY.

In this matter Mr. Graham asked the Court to vary the order to enable the plaintiff's representatives to examine a witness at Kimberley before the commission.

The required leave was given.

BREEDENKAMP V. IMPEY.

Mr. Juta, for defendant, intimated that plaintiff had withdrawn in this case. It was not a matter of compromise.

In re THE CAPE OF GOOD HOPE BANK.

Mr. Graham moved for an order in terms of the fifth report of the official liquidators. The report had been published as ordered in the *Cape Times* and *Argus*. The concluding paragraph in the report asked that the amount of the remuneration of the liquidators should be fixed, but the liquidators were anxious to leave that matter in the hands of their lordships.

The Court fixed the remuneration at £4,000.

PETITION OF JOHANNA M. M. WATERMEYER.

For leave to sue *in forma pauperis* in an action against Philip J. A. Watermeyer, sen., in respect of the administration of the estate of Frederick G. J. Watermeyer.

Mr. Webber moved and the Court granted a rule *nisi*, which was made returnable on the 8th December, on which date defendant to show cause why plaintiff shall not sue *in forma pauperis*.

CLAUSSEN V. CLAUSSEN.

Mr. Sheil, on behalf of plaintiff, moved for leave to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

The matter was referred to counsel.

TOWNSEND V. BOOSE AND ANOTHER.

Mr. Juta for applicant; Mr. Boose in person.

This was an application to make absolute the rule *nisi* restraining the respondents from dealing with more than two-third shares of the patent issued to them on the 30th July, 1892, pending an action to be instituted by the applicant for a declaration of rights.

After hearing affidavits, the Court allowed the rule *nisi* to stand, the matter to come up again on Thursday.

IN THE INSOLVENT ESTATE OF EDWARD L. CHIAPPINI.

Mr. Juta asked the Court to make absolute the rule *nisi* for the payment to the trustee of the said estate of the amount paid into the Guardians' Fund to the credit of the said Chiappini, being the award to him in respect of twenty shares registered in his name in the Natal Land Company, of which shares the certificates are lost or mislaid.

The rule was made absolute.

PETITION OF MARION E. E. MASON.

Mr. Graham moved to make absolute the rule *nisi* for authority to the executors of the late Thomas B. C. Bailey to pay out to petitioner the legacy to which she is entitled out of the estate, she having been deserted by her husband, to whom she is married in community of property, and left in poor circumstances.

The order was granted.

VAN OUDTSHOORN V. VAN OUDTSHOORN.

On the motion of Mr. Molteno, the Court made absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

THE KNYSNA CONSOLIDATED GOLD-MINING COMPANY.

Mr. Juta moved for leave to the official liquidator to dispose of the assets of the company, in terms of an agreement come to with all persons interested.

The Court granted the order.

IN THE ESTATE OF MARTHA FRANCES HUDSON DECEASED.

Mr. Meltano moved for authority to one of the two executors in the estate to transfer to the purchaser thereof certain erf No. 31, situate in the village of Humansdorp, without the assistance of his co-executor, who has left the Colony, and whose address is unknown. The account, he explained, had been filed in the Master's Office, and the vendee wished to get transfer.

The Court granted the authority.

HOPKINS V. HOPKINS.

On the motion of Mr. Sheil, the Court made absolute the rule *nisi* dissolving the marriage subsisting between the parties, by reason of the defendant's failure to obey the order of Court for restitution of conjugal rights.

GROENEWALD V. GROENEWALD.

On the motion of Mr. Molteno, the rule *nisi* was made absolute admitting plaintiff to sue defendant *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

In re SCHUNKER'S INSOLVENT ESTATE.

On the motion of Mr. Juta, Mr. Gibson, the secretary of the South African Association, was appointed provisional trustee.

DAWSON V. DAWSON.

1892.
22nd Nov.

Husband and wife—Malicious desertion—
Divorce—Forfeiture of benefits—Ante-nuptial contract.

A plaintiff, who is entitled to a decree of divorce on the ground of the defendant's malicious desertion, is also entitled to have it declared that the defendant has forfeited the benefits conferred on him or her either under any ante-nuptial contract, or by virtue of the community of goods, and to recover back any property given to or settled on the defendant by virtue of such contract.

This was the return day of a rule *nisi* granted on the 1st August last calling upon the defendant to show cause why a decree of divorce should not be granted on the grounds of her malicious desertion.

The parties were married by ante-nuptial contract in Cape Town in 1887, subsequently in 1890

the defendant went to England and refused to return to the plaintiff, although it was proved at the trial that he had sent her during her absence over £800.

By the ante-nuptial contract the plaintiff made certain statements of shares and money on his wife and ceded to her a policy effected on his life for £500.

In his declaration the plaintiff prayed for a forfeiture of these benefits.

Mr. Sheil, for plaintiff, now moved to make absolute the rule nisi for the dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to her husband of his conjugal rights, and to declare her to have forfeited all benefits conferred upon her by ante-nuptial contract.

The Court granted the decree of divorce with costs.

Counsel was heard on the subject of forfeiture.

Cur ad vult.

Postea (November 28rd.)

The Court delivered judgment.

The Chief Justice said: In this case a decree of divorce on the ground of the defendant's malicious desertion has already been granted, but the question whether a decree of forfeiture of benefits should also be granted has stood over for further consideration. In cases of divorce on the ground of adultery, it has never been doubted that the Court may order a forfeiture by the guilty party of all benefits which he or she may have derived from the marriage either by virtue of community of goods or by virtue of any ante-nuptial contract. There is considerable obscurity as to the Roman law and the Dutch law on the subject. In Justinian's time, and before he legislated on the subject, it may be broadly stated that a guilty wife, who was divorced, forfeited the *dos* contributed by her or on her behalf, and the guilty husband forfeited the *donatio propter nuptias* contributed by him. Justinian provided for the case of marriages entered into without a *dos* or *donatio propter nuptias*, and enacted in effect (Code 5, 17, 11) that in such a case the innocent husband or wife, as the case might be, should acquire one-fourth part of the property of the guilty spouse, provided it did not exceed one hundred pounds, with a usufructuary right only in case there should be children of the marriage. Both *Matthaeus* (*De Crim.*, 48, 8, 14) and *Brouwer* (*de jure con.*, 2, 88, 24) construe the Political Edict of 1580, article 18, as reserving Justinian's Constitution intact in the law of the Netherlands. I am not aware of any case in which any South African Court has travelled beyond the broad principle that a husband or wife who is

entitled to a decree of divorce on the ground of adultery is also entitled to claim a restitution of all property which he or she may have given by way of donation to the guilty spouse, including property contributed by the innocent spouse to the community. Does the same principle apply to divorce on the ground of malicious desertion? No authority has been cited, although the Dutch authorities teem with discussions on the subject. *Brouwer*, in the passage already cited, places malicious desertion on exactly the same footing as adultery, as it affects the consequences of a divorce. "*Haec duo*," he says, "*pari passu ambulat*." *Voet's* opinion on the point in the case of divorce on the ground of adultery appears to be in conflict with that of *Matthaeus* and *Brouwer* (see 48, 6, 11), but in the case of divorce on the ground of malicious desertion he is emphatic in accepting a principle similar in every respect but one to that which this Court has always acted upon in cases of adultery. "Where," says he (24, 2, 9), "one of two spouses has by decree of the judge been declared to be guilty of malicious desertion, the penalty is that he or she shall not enjoy any profit which could be derived out of the goods of the deserted spouse by virtue either of any ante-nuptial contract or of the statutory community of property, and that he or she should moreover be bound to restore all gifts conferred on him or her by the innocent spouse before or at the time of marriage, as also a moiety of the nuptial expenses; so much so that if the innocent spouse is prevented by death from claiming the penalty the right is transmitted to his or her heirs." The right to recover a moiety of the expenses connected with the marriage ceremony has never been recognised by this Court even in the case of adultery, and I am not prepared to say that the Court would in any case uphold it. But the rest of the passage which I have quoted from *Voet* is, in my opinion, quite consistent with every principle of our law, and there is certainly no decision of this Court in conflict with it. In the present case the plaintiff and the defendant were married by antenuptial contract excluding community of property. The plaintiff, besides paying £850 to his wife, and settling some shares in the Guardian Insurance Company on her, ceded a policy of insurance on his own life to trustees for her benefit. She has wilfully, maliciously, and without just cause refused to return to her husband, in consequence of which he has succeeded in obtaining a divorce from her. He is, in my opinion, further entitled to have it declared that she has forfeited the benefits conferred upon her by the ante-nuptial contract, and to recover the money, the shares, and the policy, as well as the costs of this action.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissonne.]

DUNSTAN V. HASTIE. { 1892.
22nd Nov.

Principal and surety—Promise to pay—Consideration.

In an action brought by a creditor against the alleged principal debtor, judgment was given for the defendant on the ground that he had incurred no debt in favour of the plaintiff.

Held, that so long as that judgment stood the plaintiff could not recover the debt from the surety as such.

Before the action was brought against the principal debtor the surety promised the creditor that, if he would bring such action, he (the surety) would, failing payment, be liable for the debt and costs.

Held, affirming the Magistrate's decision, that the plaintiff's trouble and expense in instituting the original action as well as the advantage to the present defendant that the principal debtor should, in the first instance, be held liable, was sufficient consideration for the promise to pay the debt and costs.

This was an appeal from a decision of the Resident Magistrate of Wynberg, in an action in which the respondent (plaintiff in the court below) sued the appellant for £7, being the price of a set of harness sold to one Archer, for whom the defendant was alleged to have become surety.

The summons alleged (1) that in October, 1891, the defendant verbally guaranteed that if the plaintiff supplied one Archer with a set of harness for £7 he (the defendant) would be answerable to plaintiff for the same, and that in consideration of the said verbal guarantee, the plaintiff did in October, 1891, supply the said Archer with the said harness valued at £7. The plaintiff also alleged (2) that the defendant had repeatedly promised to pay him the £7, and whatever costs he might incur in suing Archer for same, in case Archer failed to pay. Plaintiff further said (3) that he had sued Archer for the £7, and that the costs of suit were £4 10s. 4d., as per taxed bill of costs in possession of defendant's agent, and that the said Archer had failed to pay the said sum of £7 and costs, or any portion thereof, and plaintiff finally said (4) that the defendant now wrongfully refused to pay the said £7 and costs aforesaid.

Plaintiff prayed for judgment with costs of suit.

The defendant, through his agent, excepted to the summons on the ground that it was vague, insufficient, and embarrassing, and in case that exception were overruled, he pleaded :

1. A general denial of all the statements and averments in paragraphs 1, 2, 3, and 4 of the summons.

2. Want of consideration for the alleged promise contained in paragraph 2 of the summons.

3. That this Court having on the 5th February, 1892, given final judgment for the defendant in the case of "*Hastie v. Archer*," wherein the present plaintiff sued the Archer referred to in the present summons for £7 for the harness, the subject of the present suit, whereby the Court then held that the harness was not sold to Archer, and that judgment not having been reversed on appeal, it was not competent for the plaintiff to sue the defendant in the present proceedings. The Magistrate overruled the exceptions, and gave judgment for the plaintiff for £7 and £4 10s. for costs as prayed, with costs of suit.

From this judgment the present appeal was brought.

From the record it appeared that in January, 1892, Hastie sued Archer as the purchaser, and the case was dismissed. Afterwards, on the 14th April, 1892, Hastie sued Dunstan as the purchaser and principal debtor. In that case absolution from the instance was granted on the grounds that the defendant was not the principal, but the surety.

Finally the plaintiff sued Dunstan as the surety and judgment was given for plaintiff as stated above.

The Magistrate found as a fact on the evidence given in the two previous cases, as well as in the present, that Dunstan had promised to see the plaintiff paid if Archer did not pay, although this was denied by Dunstan.

Mr. Graham was heard in support of the appeal, and referred in argument to Potier, (part 2, ch. 6, sec 366), and to Van der Linden, (p. 207).

Mr. Watermeyer, for the respondent, was not called upon.

The Chief Justice, in giving judgment, said : In the action brought by the present plaintiff against Archer judgment was given for Archer with costs. That judgment proceeded upon the ground that no debt whatever had been incurred by Archer in favour of the plaintiff, and it has never been appealed against.

If therefore the present action were based only upon the alleged suretyship of the defendant for Archer it is clear that the Magistrate's judgment in favour of the plaintiff could not be supported. But the second count alleges that the plaintiff had been induced by the defendant to sue Archer upon the distinct promise that if the money was not recovered from Archer the defendant would pay to the plaintiff the amount of the debt and the costs of action against Archer.

This allegation is supported by the evidence of the plaintiff himself and was believed by the

Magistrate. It is contended on behalf of the defendant that there was no consideration for his alleged promise.

In my opinion there was a two-fold consideration, for not only was the plaintiff put to considerable trouble and expense in suing Archer, but it was an advantage to the defendant himself that not he, but Archer, should be held liable for the debt.

The evidence satisfies me that the Court below erred in giving judgment for Archer in the first case, and that he really was the principal debtor and the defendant the surety. In the face, however, of that judgment the plaintiff could not successfully sue the defendant as surety. But the defendant is in my opinion bound by his promise to pay the debt and costs, supported as it was by ample consideration, and the appeal must therefore be dismissed with costs.

[Appellant's Attorney, J. Hamilton Walker; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

LOTTER V. OTTO. { 1892.
22nd Nov.

Contract—Breach—Specific performance—
Damages—Exception—Resident Magistrate—Appeal.

Mr. Molteno appeared for the appellant; the respondent was not represented by counsel.

This was an appeal from a decision of the Acting Resident Magistrate of Bredasdorp in an action in which the appellant (plaintiff in the Court below) sued the respondent for £20 damages, alleged to have been sustained by his breach of contract in failing to deliver 100 bags of everlasting flowers in terms of an agreement entered into between the parties on the 26th July, 1892.

The defendant excepted to the summons on the ground that he should have been sued for fulfilment of the alleged contract, and as an alternative, in case of non-delivery, for damages for breach of contract.

The Acting Resident Magistrate sustained this exception with costs, and from that judgment the present appeal was brought.

Mr. Molteno was heard in support of the appeal, but was not allowed to conclude his argument.

The Chief Justice said there was no necessity for hearing further argument. It was quite open to the plaintiff to sue for specific performance or for damages for breach of contract. The Magistrate was quite mistaken, and the appeal must be allowed with costs.

The case was remitted back to the Magistrate accordingly.

[Attorneys for the Appellant, Messrs. Scanlen & Syfret.]

DANTILE V. MTIRARA. { 1892.
22nd Nov.

Native law—Transkei—Adultery—Damages—Proclamation of 26th August, 1885.

The plaintiff, a native of the Transkei, having been there married to a sixth wife during the lifetime of his other wives but before the date of the Proclamation of 26th August, 1885.

Held, that the Magistrate of St. Mark's against whose judgment the defendant appealed was justified by native law in awarding damages against another native who had committed adultery with such wife.

Mr. Juta appeared for the appellant, and Mr. Searle for the respondent.

This was an appeal from a judgment of the Assistant Resident Magistrate of St. Mark's in an action in which the respondent (plaintiff in the Court below and an influential chief in the Transkei), sued the appellant for damages by reason of his having committed adultery with one of the plaintiff's wives, by name Notahapu.

The plaintiff married Notahapu, who was his sixth wife, in 1884. The adultery was clearly proved at the trial. There was also some evidence to show that although the plaintiff, when he heard of his wife's adultery, turned her out of his kraal, still he intended to take her back when the case against the defendant had been decided.

The Assistant Resident Magistrate gave judgment for the plaintiff for twenty head of cattle, or their value £40, and from that judgment the present appeal was brought.

The Assistant Resident Magistrate stated in his reasons *inter alia* that as the plaintiff was one of the largest and most influential chiefs in the Transkei, he awarded him a judgment suitable to his station, and entirely in accordance with Kafir law and custom.

Mr. Juta was heard in support of the appeal and referred to Proclamation 140 of 1885, sections 29—34. He contended that since the proclamation only one marriage is recognised in the Transkei amongst natives, and that if other women are married by native custom these are mere concubines. Respondent's alleged wife was only a concubine, and he sustained no injury. The Court would not recognise native customs which were opposed to all sense of morality.

Further there was strong evidence of collusion between plaintiff and his wife.

Mr. Searle, for the respondent: The marriage was contracted before the proclamation came into force, and is valid by native law. The decision of the Magistrate was in strict accordance with native law and custom. He cited "Maclean's Native Laws and Customs," pp. 70 and 111, and the Report of the N.L. Commission. He also referred to "Tabata v. Tabata" (5 Juta, 328).

The Chief Justice, in giving judgment, said: I attach considerable weight to the fact that the so-called marriage between the plaintiff and Nohapu took place before the date of the proclamation. Assuming that the proclamation has the wide meaning contended for by the appellant's counsel, I do not consider it was intended to have a retro-active effect so as to deprive the plaintiff of any remedy which he would have had against the adulterer with his wife if the proclamation had not been issued.

The fact of its providing that in questions of divorce and separation native law shall apply to marriages entered into before the proclamation is not sufficient to show that it was intended that native law should not apply to such marriages in questions of damages for adultery.

If by native law damages could be claimed, even if there had been collusion between the husband and wife, the Magistrate would have been justified in disregarding such a law, but in fact he appears to have come to the conclusion that there had been no collusion. The circumstance that the plaintiff admitted that he intended afterwards to take back his wife raised a strong presumption of collusion, but that presumption was rebutted by conclusive evidence to the contrary.

The question to be determined is whether, according to the law of the plaintiff's and defendant's tribe, the husband of a native wife, not being the first wife, can recover damages from the adulterer with such wife, when the presumption of collusion arising from such an admission has been conclusively rebutted.

Upon this question the Magistrate, who is thoroughly conversant with native law, has expressed a decided opinion in the affirmative.

He is supported by the passages quoted from Maclean's work and from the evidence given before the Native Laws Commission.

Without now deciding what law would be applicable in case the marriage had taken place after the date of the proclamation, I am of opinion that the appeal against the Magistrate's judgment, whereby he has awarded cattle worth £40 as damages, must be dismissed with costs.

[Attorneys for the Appellant, Messrs. Van Zyl & Buissinué; Attorneys for the Respondent, Messrs. Findlay & Tait]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, {
K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. 21th Nov.
Justice UPINGTON, K.C.M.G.}]

PROVISIONAL ROLL.

BERTHA HIRSCHBERG V. JAMES M. HORN.

Mr. Juta moved for judgment for £35 18s. 4d. defendant in default.

Judgment was granted.

STEPHAN BROS. V. PIERRE MATTHYS
MEISSENHEIMER.

Mr. Graham moved for provisional sentence for £894, with interest thereon, which had been advanced to defendant.

Granted.

VAN DER BYL AND CO. V. MATTHIAS
FRANÇOIS LOTTER.

Mr. Juta moved for judgment, under rule 329, for £32 18s. 8d., being the amount of goods sold to defendant.

Judgment granted for amount claimed.

REHABILITATIONS.

On motion from the Bar, the following insolvents were granted their rehabilitations: William Vallanco, Alfred Henry Mitchell, Gustav Salomon, and Ludwig Salomon.

IN THE ESTATE OF THE LATE JAN HENDRIK
MALAN.

Mr. Juta moved for authority to the executors to apply the sum paid in to the Guardians' Fund to the credit of the minor heirs of the said estate in reduction of the claim of the official liquidators of the Paarl Bank in respect of eleven shares registered in the name of the said Malan.

The Court granted the order.

CLAUSSEN V. OLAUSSEN.

Mr. Shell, for plaintiff, moved for a rule nisi requiring her husband to show cause why she should not be permitted to sue him *in forma pauperis* in an action for divorce by reason of his alleged adultery.

The rule was granted, and made returnable on Thursday next.

SIMON V. THE EQUITABLE MARINE
AND FIRE ASSURANCE COM-
PANY. { 1892.
24th Nov.

Fire—Insurance—Misrepresentation—Proposal—Agent.

To an action on a Policy of Fire Insurance it was pleaded that there had been a misrepresentation by the plaintiff of certain material facts, namely, that the goods insured included certain hazardous goods, that no hazardous business was carried on in the premises, and that the premises were not attached to any other premises.

Held, that, inasmuch as the defendants' agent had carefully inspected the goods and the premises, and had himself drawn the proposal with full knowledge of the nature of the goods, business, and premises, and the plaintiff had, without fraud or collusion, signed the proposal after giving all the requisite information to the agent, and in the belief that the proposal disclosed everything that it was necessary for him to disclose, the plaintiff was entitled to recover.

Drysdale v. Union Fire Insurance Co. (8 Juta, 63) approved.

Mr. Juta and Mr. Webber appeared for the plaintiff, and the Attorney-General and Mr. Molteno for the defendant company.

This was an action instituted by the plaintiff, Simeon Simon, against the Equitable Marine and Fire Assurance Company (Limited), for the sum of £800, being the amount of a fire policy effected on the plaintiff's goods on his premises No. 44, Queen-street, Port Elizabeth, and which were destroyed by fire on the 17th April, 1892.

The defendants, in their plea, denied that the insurance had been duly effected.

They pleaded, *inter alia*, that in the proposal the plaintiff, in answer to a question therein put, described the building, Queen's-street, No. 44, as being detached from all other buildings. That the said answer was false, inasmuch as the said building was in fact not detached, and the plaintiff by the said answer falsely misrepresented a material fact to the defendants, by which misrepresentation of a material fact the policy of insurance relied on in this suit was *ab initio*, and is null and void.

They further pleaded that in the said proposal the plaintiff, in answer to a question therein put, described the building, Queen-street, No. 44, as being occupied as a shop and as containing no

hazardous goods and that no hazardous business was carried on in the premises.

That part of the building occupied by the plaintiff, afterwards destroyed by fire, was at the time of the said proposal and thereafter occupied by him not as a shop, but as a factory for upholstery and mattresses, and there was therein stored quantities of hazardous goods, to wit, turpentine, tallow, spirits, straw, and coir.

That by reason of the concealment and misrepresentation of material facts hereinbefore referred to, the policy of insurance relied on in this suit was *ab initio* and is null and void.

Wherefore they prayed that plaintiff's claim might be dismissed with costs.

The Attorney-General put in an alternative plea, in case it should appear that the hazardous goods were brought into the store between the date of the policy and the date of the fire.

Herman Peycke, examined by Mr. Juta, deposed that he resided at Port Elizabeth, where he carried on business as a commission agent. He acted as agent of the defendant company in his own name for about eighteen months, and before that for two years. He acted for a number of other companies. He had a letter of appointment (produced). He took risks on account of the defendant company, and only communicated with them in special cases. In other cases he simply took the risk without communicating.

The Chief Justice said the letter handed in did not amount to an appointment.

The witness said he had no other letter, and he had done all the business on the letter produced. Witness knew the plaintiff in this action. He resided in Port Elizabeth. Witness called upon him in October last year. Simon did not come to him. Witness's purpose was to get Simon to insure with the company. He went over all the premises. In the front there was a crockery shop, and further back an upholstery business was carried on. Witness went over every room, downstairs and upstairs, and saw straw, mattresses, and, he thought, paraffine and some tins of spirits. He saw the adjoining premises. In the yard attached to the north there was an iron shed, where he saw a Cape cart standing, and a few bundles of forage. He saw the stables, but they were not immediately attached to the wall.—Q. You know the defence the defendants have set up in this case; was there any misrepresentation or concealment on Mr. Simon's part?—A. No concealment whatever. He just showed me all his stock, which I asked to see. Nothing particular was said about the upholstery. I drew a rough sketch of the place, and subsequently made a plan in my office. I filled up a proposal form in my office when I was by myself. Simon did not state to me anything that I should put in. On the 22nd October I wrote to the company

stating that Simon would insure, and asking what I might quote. I added: "I do not care to accept the risk on account of one part being a wooden wall." Witness sent the proposal with this letter and also a sketch. [Produced.] I received a reply from the company complaining that I had not stated what the business was to be. I wrote on the 29th October that there was a crockery shop and some furniture and other household effects, and that no work except upholstery was carried on on the premises. On the 2nd November they wrote, saying if they took it at all they would require a good rate on it. On 5th November I replied that the proposal would be signed, that the rate of premium had been agreed upon, and that the amount to be covered would be £500 or £600. On the 9th November they replied: "You will have to get 20s. It is not a happy risk."—Q. Was 20s. a very high rate?—A. Yes, I have never in my experience as an insurance agent at Port Elizabeth had as high a rate. Mr. Simon was not willing to pay 20s., and did not insure at that time. In February he happened to come to the office one afternoon on some other matters of business, and I got him to sign. It was the same proposal as I had filled in originally. Simon did not read the proposal, nor did I read it to him. I sent the proposal to the company with a letter dated 12th February, stating: "Enclosed, please find the proposal for Simon for £800 which I accepted at 20s., being the rate quoted by you in a former letter." I sent another plan with this proposal, and this latter plan showed the full nature of the risk. The proposal was sent back without the plan. I received the premium from Simon.—Q. In the proposal which was signed it is stated that the building is detached, were you aware that when Simon signed it the building was not entirely detached?—A. Yes.

By the Court: I am not a supporter of Simon's in any way, but I have occasionally done business with him.

By Mr. Juta: I received another letter from the secretary of the company, who did not consider the insurance satisfactory, and adding: "You first of all mentioned that it would be £100 or £500, which I thought quite enough. In the proposal for £800 I have reinsured a large portion of it, not caring to keep a line which I don't like." The policy was then sent to Simon, and he immediately called and drew my attention to some errors in the policy. He referred to the word "detached," and spoke about the hazardous goods. He said to me, "There's only twenty gallons of petroleum oil," and I told him that covered everything of an inflammable nature. I told him that the word "detached" was a mistake, and that I would have it altered. I did not write to the company about it. I forgot. Remembered the fire on 17th April.

The police took possession on the 18th. I got notice from Simon in regard to the fire, and I wired to the company. Mr. Percival, secretary of the company, arrived three days after, and we had a row, and I told him I would accept no more instructions.

Cross-examined by the Attorney-General: For some years before the firm was dissolved I, as one of the old members of the firm, conducted the business for the insurance company. I do not remember having received any instructions with respect to the filling up of proposals. I did not know when I called upon Simon that his place of business was not insured. I went into his shop and asked him if he would not insure with us, and I pointed out to him the folly of not insuring. I knew his business, and had been over his place once or twice before. On the 22nd October I visited the place again, and made a little sketch. I admit there was a mistake on the first plan which was drawn.—Q. You knew you were submitting to the company a plan which would be taken as truthful?—A. I did not consider the danger at that moment. In February I again went through every room. Saw some turpentine about the centre of the building—three or four gallons in tins. It is a fact that Simon said nothing, but that he wanted to insure. Simon owes me about £40. I have had transactions amounting to £90 with him.

By Mr. Juta: In the policy petroleum is doubly hazardous.

By the Chief Justice: I thought twenty gallons of petroleum would include twenty gallons of more or less inflammable material.—Q. You did not correct the expression "detached" in the policy; is that the way you generally attend to business, or is this a special occasion?—A. I admit that I made a mistake there.

Simeon Simon, the plaintiff in the action, deposed: Up to April last I carried on business in Port Elizabeth as a dealer in crockery and new and second-hand furniture, and also as an upholsterer. I remember Peycke calling and asking me to insure. I told him that I did not care much about it. He communicated with his company in Cape Town as to the rate, but I never made any proposal at that time. I gave Mr. Peycke no instructions as to the proposal. Eventually the rate was stated to be 20s., and that I considered too much. In February I went to Mr. Peycke's offices with the view of ordering some goods. He spoke to me about insurance, and I agreed, and he put before me a proposal which I signed, but I did not read it. I paid the premium afterwards, and immediately on receiving my policy I called upon Peycke. I called his attention to the fact that he had stated that the premises were "detached"; also that he had only allowed me twenty gallons

of petroleum, and no mention of my upholstery business. He admitted that the word "detached" was an error, but as he was sending a corrected plan to the company they fully knew of the nature of the risk. Peycke told me that so long as the petroleum did not exceed twenty gallons I could keep it. He also showed me a letter which he had written to the company telling them of the character of my business, and had it not been for that I should have returned the policy. I had some kegs of butter. At the time of the insurance there was no petroleum. There were seven or eight gallons of turpentine and spirits which I had for the purposes of my business. The straw was kept upstairs. I was informed that the high rate was simply on account of the stock and the nature of the surrounding buildings. He informed me that a gentleman having the same class of goods only paid 7s. 6d. When the fire took place I had no more of these inflammable goods than was necessary for the purposes of business. There was one tin of paraffine, it was not burned. It was on a concrete floor. There were no large quantities brought into the premises between the time I insured and the date of the fire. The straw was used as packing for the crockery. The police took charge of the premises. I subsequently sent in an account drawn up by Mr. Martin, the accountant. (Produced.) The estimated profit, 25 per cent., was very low. It was not the gross profit. I had afterwards communications respecting the salvage. The company repudiated their liability. I obtained possession of the salvage some time in July, when I called in two surveyors, who made a report, and thereupon the stuff was sold. The salvage realised £201. The hazardous goods were not destroyed. The turpentine and the petroleum were there after the fire, and whatever was found was all that I had. I had more in my premises than £800 worth of stuff.

Cross-examined: The smell of paraffine after the fire was due to the leakage of the tin the oil ran along the concrete floor. Remembered Mr. Lundy's and Mr. Peroival's visit. Mr. Lundy did not ask witness whether or not he used turpentine in his business. There were two tins of dry senna, besides four of turpentine. Witness never said that the turpentine must have been bought as a job lot at a sale. The turpentine was used for cleaning purposes. Witness admitted having been convicted for receiving stolen goods. He signed the proposal, and did not read it for he was in a hurry at the time. The turpentine was sold as "sundries," and would appear as such in the accounts.

Wm. Scruton, auctioneer and appraiser, Port Elizabeth, said he lived exactly opposite the house in which the fire occurred on the 22nd July. He

received instructions to examine the salvage, and surveyed it along with the manager of the Co-operative Stores. The police were in charge of it every day. In his report he certified that the goods were in a very damaged and unmerchantable condition, and he recommended a sale by public auction. Held a sale for two days, and the gross proceeds, after deducting expenses, were £155. Did not consider £890 was an excessive value; there would be fully that amount in the place. Sold some butter. (Specimens produced.) It would require an expert to say whether it was butter or not.

James Martin, accountant, Port Elizabeth, had gone over the invoices and papers in this business, and drawn up a statement showing the position of the plaintiff. The 25 per cent. gross profit was his own estimate, and he had no difficulty in framing the list.

Mr. Juta handed in all the correspondence and telegrams between the parties, and closed the case for the plaintiff.

For the defence, Robert H. Lundy, fire assessor, deposed, in answer to the Attorney-General, that he had been engaged to make inquiries for the defendant company in this case. He went and saw the premises the Tuesday following the fire. Went all over the premises. In the back room found a large quantity of straw, pretty near a wagon-load. There was very little furniture about, but in the centre there were remains of furniture. He discovered six one-gallon tins of turpentine covered with debris. They were all standing together. Two or three months after the fire went over the premises again, and found a decided smell of paraffine. There was an enormous quantity of forage adjoining the premises. The stable was not burned. Made a thorough inspection of the premises with Mr. Peroival on the Thursday after the fire, and while talking together Simon came up. Asked him whether he used turpentine in his business, and he said no. Told him there was turpentine stored there, and he said, "Well, it must have been some job lot I picked up at an auction."

Cross-examined by Mr. Juta: Witness saw no paraffine and smelt none at the first visit. The smell would hardly remain for two days when exposed to the open air. Concluded that the business was only used as a shop.—Q. How did you come then to ask him if he used turpentine in his business?—A. Because I looked to see how far the business corresponded with the description given by him to the company.—Q. Do you swear that you asked him, "Do you use turpentine in your business?"—A. One of the tins was open. The rest were intact, and were not injured by the fire, and I knew that it was turpentine from the labels and the make of the packages.

Wm. B. Peroival, secretary of the insurance company, said he had to do with the business of

accepting risks and fixing premiums. In October, 1891, he received a letter from Mr. Peycke covering a proposal, which was unsigned, and the correspondence, which was put in. With regard to the letter from Mr. Peycke, dated 17th February, there was no plan along with that letter. He never received any plan except the original small sketch attached to the proposal, and the only information he had at the time was that sketch.—Q. Had you known that these premises were attached and that there was this manufacture of mattresses, what would you have done?—A. Had I known that there was a mattress manufactory I should have objected to this at once, and most assuredly, had I known there was a forage store alongside of it, I would not have taken it under any circumstances. Had I known what the truth was I would not have accepted the risk. Visited the premises the day after the fire, and saw at the back of the building a large quantity of straw and coir scattered about, giving one the impression of a rather extensive mattress factory. Saw four or five tins of turpentine. Simon said he did not use turpentine in his business.

Cross-examined: Knew that upholstery business was carried on, but understood that it was a second-hand furniture dealer's and crockery business, not of a very high-class order. The highest rate he had got in Port Elizabeth was 12s. 6d.—Q. What induced you to fix so high a charge if you knew it was only a second-hand furniture shop?—A. Reading between the lines, I saw that it was not a very high-class business; that indeed it was a very low-class business.

By the Court: Was it because the business was small that you thought the man was likely to be low?—A. I did not like the name. I did not consider it a happy risk.

By the Court: Why did you not have the terms of the policy altered?—A. I quite anticipated that the 20s. rate would preclude insurance altogether, and if the real facts of the case had been before me nothing would have induced me to take the risk.

By the Court: Who should submit the facts of the case to you but your agent? How long has Peycke been a trusted agent of the company?—A. Up to the time of the fire. I never had reason to find fault with him before in any matter of importance. He worked in a *bona-fide* manner.

Charles Edenbury, secretary to the S. Cyprian Benefit Society, Port Elizabeth, said the society bought the premises in question ten days after the fire, but did not get possession for some time. Discovered at least twelve tins of turpentine among the debris. Found a strong smell of paraffine in the room next to the kitchen. Found 25 lb. of butter in a tin, and put it on the market and sold it. There was also tallow on the floor,

Thomas Crawford, upholsterer and mattress-maker, Cape Town, said he had had twenty years' experience in the trade, and never had any occasion to use turpentine, nor did he ever see it used.

This concluded the case for the defendants, and the Attorney-General having withdrawn the first and second pleas, addressed the Court on the third. Mr. Juta was not called upon.

The Chief Justice said: The secretary for the defendant company has stated in his evidence that for several years before the present dispute arose Peycke had been the trusted agent of the company at Port Elizabeth. He was the person employed during that time to obtain insurances for the company, to inspect premises intended to be insured, and to make the necessary arrangements with persons applying for assurance.

In that capacity he communicated with the plaintiff. He urged upon the plaintiff to insure the goods in question, and after the plaintiff had refused he again urged the advisability of not leaving the goods uninsured. It was Peycke who examined the stock, and who, when the plaintiff at length yielded, drew up the proposal and framed the plan of the premises. After the policy had been handed to the plaintiff, he called upon Peycke and told him that he was not satisfied with the policy, which referred to the premises as being detached, to his business being a shop only, and to no hazardous goods being kept in the shop.

Peycke told the plaintiff that a correct plan of the adjoining premises had been sent to the company, that the company had been informed that an upholsterer's business was carried on in the shop, and that, inasmuch as twenty gallons of petroleum, which is treated in the policy as doubly hazardous, were allowed, there was no objection to the few gallons of turpentine and the less inflammable material kept there.

Under these circumstances the defendant company has set up the defence that the policy had been granted upon the plaintiff's misrepresentation of facts.

The alleged misrepresentation consists in the concealment of the fact that the premises were attached to other premises, that a hazardous business was carried on in the plaintiff's shop and that hazardous goods were kept therein.

The Attorney-General has very fairly withdrawn the pleas resting upon the two first grounds, and the question only remains whether the plea of misrepresentation as to hazardous goods can be sustained. I am satisfied that when Peycke examined the premises he saw the so-called hazardous goods, and that neither at that time nor at the time of the fire were there more than twenty gallons of such goods.

I am satisfied that the plaintiff's omission to enter them in the proposal was owing to Peycke's representation that the twenty gallons of petre-

leum allowed by the company would cover the inflammable material, such as turpentine and butter, which he kept in store.

The defendant company's agent transacted their business in the most slovenly and negligent manner possible, but that is their misfortune. The plaintiff was justified in regarding Peycke as the person whose duty it was to give all the requisite information as to the form of proposal and as to the disclosures which he was bound to make.

It is not alleged, nor is there any proof, that there was collusion between the plaintiff and Peycke. In the absence of such proof it is clear that the principles laid down in *Drysdale v. Union Fire Insurance Co.* (8 Jut., 63) are applicable to this case. All the requisite information was given by the plaintiff to Peycke, and if the proposal omitted to repeat that information, the omission was due to Peycke's action and to that only.

The value of the damaged goods in my opinion exceeded £800, and the judgment of the Court must therefore be for the plaintiff for the sum assured less the net amount realised by the salvage goods, with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissin ; Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, (K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. Nov. 25th.
Justice UPINGTON, K.C.M.G.)]

REGINA V. ISAAC LOURENS AND HANS LOURENS.

This case came up for review from the Resident Magistrate of Knysna.

Mr. Justice Buchanan said the prisoners were charged with injuring a certain ox. The only evidence against them was that the ox was traced to within eighteen yards of their hut, and was found injured. There was a third person in the hut at the time. There was no evidence to show that the prisoners were present when the injury was inflicted. No one saw them inflict the wound on the ox. It was a case of pure suspicion. The strongest thing against the prisoners was that they did not go into the box to deny the charge, but they were not obliged to do so. There was no evidence to convict, and both convictions must be quashed.

BARRENA V BARRENA. { 1892.
Nov. 25th.

This was an action for the restitution of conjugal rights.

Mr. McLachlan for plaintiff; defendant in default.

Mr. Norman Lacy gave formal evidence as to the entry of the marriage in the register.

The copy of the marriage certificate given by the clergyman who married the parties gave the date of the marriage as the 18th instead of the 24th June, 1889.

Matilda Barrena, the plaintiff, in answer to Mr. McLachlan, said the signatures on the marriage certificate (produced) were those of herself and husband. They lived five months together happily. Her husband left on 15th December, 1889, to work at Delagoa Bay. He never wrote to her, but she wrote to him. He never contributed to her support. Her brother supported her. She had one child. It was two years and six months old. She wished her husband to return, or she would go to him if he sent for her. She wished to retain the custody of the child.

The Chief Justice said that, subject to the production of a certified copy of the marriage certificate, the Court would grant a decree for restitution of conjugal rights, and if the defendant failed to return to or receive his wife by the 12th February next, the Court would grant a rule nisi calling upon him to show cause by the last day of next term why a decree of divorce should not be granted; the rule to be served in the usual manner, and the plaintiff to have the custody of the child.

[Plaintiff's Attorney, J. Hamilton Walker.]

CARTWRIGHT V. CARTWRIGHT AND MASON. { 1892.
Nov. 25th.

This was an action for divorce on the ground of defendant's adultery.

Mr. McLachlan for the plaintiff; defendants were not represented. Damages were laid against the co-defendant at £50.

Joseph Henry Cartwright, plaintiff, in answer to Mr. McLachlan, said he was a clerk in the employment of Messrs. W. & G. Scott, timber merchants, Cape Town. He was married at Birkenhead on June 29, 1880. (Certificate produced.) After marriage he lived in Birkenhead. He came to the Cape in 1882. First met Mason in February of this year. He came out in the same boat as Mrs. Cartwright, and witness was persuaded by his wife to take him as a lodger. His wife came out in February. After her arrival he found she was addicted to drink. She left him on 20th April—same day as Mason went to Dassen Island. She returned on the Friday following. There was one

child born of the marriage, in Birkenhead, in 1884. On the 27th April of the present year she again left, and went to Dassen Island. Did not hear of her until 6th May, when she came down to Scotts' works and asked for the child. Plaintiff had previously picked up the child on the Central Wharf when his wife was along with some sailors. Remembered one Sunday night seeing her up in Kloof-street and found her in a public-house along with another woman. His wife and the other woman got a cab and drove to a house in Loop-street followed by two men. Since that date he had ascertained that his wife had lived in a house in Loop-street with Mason. The child was now in plaintiff's charge.

Caroline Harper deposed that she occupied a house in Loop-street and Mrs. Cartwright had lived there with Mason as "Mrs. Mason." Witness tried to turn out the pair after she knew they were not man and wife.

Mrs. Moir knew the defendant Mason. He occupied a sitting-room at her house at Claremont with Mrs. Cartwright. They lived as man and wife.

This closed the evidence for the plaintiff.

At this stage the co-defendant Mason entered the box, and stated that the plaintiff had borrowed money from him when he was cognizant of his wife's improprieties. He borrowed £2 from him, and had not returned it. He (Mason) came out to the Cape on the Pembroke Castle along with Mrs. Cartwright, who was booked by her husband as a widow with one child. He (Mason) being a single man, proposed to Mrs. Cartwright, and was accepted, and when he came to Cape Town he found that she was a married woman. Cartwright then invited him to lodge at his house.

Mrs. Cartwright, who was also in court, was called, and said she did not wish to defend her case; she only wanted to defend Mr. Mason. Mr. Cartwright had looked her up in her bedroom, and borrowed money from Mr. Mason. He knew of her relationship with Mason. Cartwright, she alleged, had been intimate with a woman who was now dead. Witness's passage had been taken out by her husband as a widow; and she had always had to support herself.

At this stage counsel withdrew the claim for damages against the co-defendant.

The Chief Justice said if damages had been pressed for in this case, the Court would have allowed the parties to enter into the questions that had been raised as to the knowledge on the part of plaintiff of his wife's adultery with the co-defendant. On the evidence plaintiff was clearly entitled to a decree of divorce. There was a charge made at the last moment that plaintiff himself was guilty of adultery, but they had no proof of that. The Court would grant a decree of divorce with

costs against both defendants, the plaintiff to have custody of the child.

[Plaintiff's Attorney, D. Tennant, jun.]

MARRIOTT V. MARRIOTT AND HAIGH. { 1892.
Nov. 25th.

This was an action for divorce on the grounds of defendant's adultery with the co-defendant, against whom £100 damages were claimed.

Mr. Graham appeared for the plaintiff; both the defendants were in default.

Colour-Sergeant Marriott, East York Regiment, the plaintiff, deposed that he was married to defendant on the 8th November, 1886, at Gibraltar. They lived together very happily, and had three children by the marriage, two of whom were now alive, aged respectively five and three years. On leaving Gibraltar plaintiff and his wife went with the regiment to the West Indies, and thence to Cape Town. In August last plaintiff went to Simon's Town on duty, and remained there until the 31st of that month. His wife remained in the married quarters of the camp at Wynberg. On returning from Simon's Town he received a communication from Colour-Sergeant Lawrence, which induced him to proceed with this action.

Colour-Sergeant Lawrence deposed that on the night of the 31st August he happened to know that Colour-Sergeant Haigh was in Colour-Sergeant Marriott's quarters with Mrs. Marriott. He looked through the window and saw the defendants commit adultery. He communicated the fact to Colour-Sergeant Marriott on the following morning. Haigh was in receipt of £72 a year, and it would cost him about £1 a month to live.

Mr. Graham asked for damages, as this was a particularly cruel case of seduction. As to enforcing the judgment, he referred to the Army Act of 1881, section 144.

The Chief Justice said it was clear in this case that the co-defendant had committed adultery with the defendant, and the only question now was what damages were to be awarded? The position of the parties must be taken into consideration. A colour-sergeant of a regiment was not in a position to pay heavy damages; £85 under all the circumstances was sufficient, especially considering that the defendant would have to pay costs. The Court would grant decree of divorce as prayed, giving plaintiff the custody of the children, and awarding him damages to the amount of £85, with costs against both defendants.

[Plaintiff's Attorney, D. Tennant, jun.]

IN THE ESTATE OF THE LATE MARIA A. OBERHOLSTER.

Mr. Searle moved for leave to partition the farm

Kruger's Baken, in the district of Middelburg, in terms of an agreement come to by the heirs, and thereafter to pass a mortgage bond thereon for the purpose of satisfying the existing bond.

The Court authorised the partition, and the passing of a bond for £600 for the purpose of paying off the existing bond of £500; and £166 18s. 4d., reimbursing petitioner for money paid on behalf of the two major heirs.

TAXEIRA V. TRUSTEE OF CORTIS. { 1892.
Nov. 26th.

Magistrate's jurisdiction — Payment — Abandonment of part of claim.

A plaintiff, assuming that £157 was owing to him by the defendant for goods sold and delivered, reduced the amount to £100 in order to bring the case within the magistrate's jurisdiction, and sued for that amount in the Magistrate's Court. The Magistrate, although not satisfied that a plea of payment of £93 could be sustained, suggested to the plaintiff that he should be content with £64 and, upon the plaintiff assenting, judgment was given for that amount.

Held, on appeal, that, as it lay upon the defendant to prove his plea and he had failed to do so, the judgment should not be disturbed.

Semble, that inasmuch as the payment of £93, if made, would have reduced the original debt of £157 to £64 and inasmuch as the Magistrate's Court had jurisdiction to decide upon a claim for this latter amount although it originally formed part of a debt beyond his jurisdiction, the fact that the plaintiff had reduced his claim to £100 upon the assumption that £93 had not been paid, would not debar him from recovering more than the difference between £100 and £93.

Kruger v. Van Vuuren's Executrix (5 Juta, 162) approved.

Mr. Sheil appeared for the appellant, and Mr. Molteno for the respondent.

This was an appeal from a judgment of the Resident Magistrate of Cape Town in an action in which the respondent (plaintiff in the Court below) sued the appellant for the sum of £157 14s. 6d., reduced to £100 to bring the claim within the

jurisdiction of the Court, for goods sold and delivered to the appellant by Cortis & Co.

The appellant pleaded payment of £93 (in support of which he produced receipts), and tendered the balance, £7, with costs to date of tender.

The Magistrate gave judgment for £64 14s. 6d. with costs.

The appellant now appealed from this judgment.

The Magistrate stated in his reasons *inter alia* that he did not believe in the *bona fides* of the alleged payment of £93, but that he did believe that Taxeira and Cortis were acting in collusion to defraud the latter's creditors. He further stated that he suggested to the plaintiff that he should be satisfied with judgment for £64 14s. 6d., and that the plaintiff agreed to this suggestion and took judgment for that amount.

Mr. Sheil was heard in support of the appeal, and urged that as an important principle was involved the case should be decided on strict legal grounds, and should be unaffected by the reasons given by the Magistrate, which were not founded upon any evidence appearing on the record. Counsel contended that the Magistrate had exceeded his jurisdiction by allowing a set-off upon an amount above the jurisdiction conferred upon him by Act 48 of 1885, section 5 (b), and above the amount claimed in the summons. Under section 5 of the Act the Magistrate's jurisdiction in illiquid cases is limited to £100, whereas in the present case he appears to have overlooked the amount of the claim in the summons, and to have adjudicated upon and allowed a set-off on the sum of £157 14s. 6d., and in this he clearly erred and encroached upon the jurisdiction of the superior Courts. The plaintiff abandoned his claim to £67 15s. 4d., and the Magistrate had no right to consider any claim except that which appeared in the summons. The defendant was sued for £100, he pleaded payment of £93, for which he produced receipts (which were not impeached), and judgment should only have been given for the balance, viz., the amount of tender, £7, with costs to date of tender. The following cases were cited: "*Charley v. Horaley*" (8 E.D.C., 488) and "*The Municipality of Steynsburg v. Green*" (8 E.D.C., 289).

Mr. Molteno, for the respondent, relied upon the Magistrate's reasons. He cited "*Taylor v. Haupt*" (5 Juta, 22).

Mr. Sheil in reply: Nothing which appears on the record can justify the conclusions arrived at by the Magistrate, as expressed in his reasons. No argument has been addressed in answer to the appellant's contention that the Magistrate exceeded his jurisdiction. "*Taylor v. Haupt*" is in favour of the appellant. Although the Magistrate doubts the *bona fides* of the payment of £93, yet

he bases his judgment upon that payment having been made.

The Chief Justice said : If the Magistrate had found that the plea of payment in part was supported by the evidence, the question would have arisen whether the abandonment by the plaintiff of part of his claim in order to bring the case within the Magistrate's jurisdiction prevents the deduction of the amount paid from the whole debt. That debt, roughly speaking, was £157. In order to bring the case within the jurisdiction of the Magistrate for the price of goods sold and delivered the plaintiff reduced his claim to £100. This reduction was made upon the assumption that no payment had been made in part. If a payment of £98 was really made in part, the effect was to reduce the debt to £64. The case of *Kruger v. Van Vuuren's Executrix* (5 Juta, 162) clearly shows that the claim of £64 would be well within the Magistrate's jurisdiction.

There is nothing to show that the £57 said to have been abandoned by the plaintiff might not fairly have formed part of the amount alleged to have been paid.

It is therefore by no means clear, assuming again the payment of the £98, that the Court was wrong in giving judgment for the £64 instead of the amount tendered by the defendant, viz : £27, being the balance after deducting £98 from £100, the amount sued for.

But in fact the Magistrate has not sustained the plea of payment. He suggested to the plaintiff that he should be satisfied with the sum of £64 and, upon the plaintiff assenting, judgment was accordingly given for that amount.

Of this judgment the plaintiff may have reason to complain, but not the defendant, who now appeals against it.

It lay upon the defendant to prove his plea of payment, and upon his failure to do so, he can certainly not take advantage of any technical difficulty, if difficulty there was, arising out of the abandonment of part of the plaintiff's claim. The appeal must be dismissed with costs.

[Appellant's Attorney, D. Tennant, jun. ; Respondents' Attorneys, Messrs. Van Zyl & Buissonne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, {
K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. { Nov. 23th.
Justice UPINGTON, K.C.M.G.]

REHABILITATIONS.

On motion from the Bar, the Court granted the rehabilitation of the following insolvents : Christopher Haylett Robertson and William James Robertson.

EAST LONDON MUNICIPALITY V. { 1892.
UMVALO. { Nov. 28th.

Municipality — Bye-law — Natives — *Ultra vires*.

By Act 23 of 1880 the East London Municipal Council is empowered to frame such bye-laws "as may seem meet for the good rule and government of the Municipality." The Council having made a bye-law that "the Council shall at any time have the right to take away all sticks from natives when it may think fit to do so."

Held, affirming the judgment of the Eastern Districts Court, that the Act did not warrant a bye-law by which a stick could be forcibly taken away and detained from a native from whom no danger was apprehended, and that the plaintiff, a native from whom a stick had, by authority of the Council, been taken away whilst peaceably employed within the Municipality, was entitled to recover the stick or its value.

Semble, that inasmuch as it had been proved that there were large numbers of aboriginal natives in East London who could not, without danger to the good government of the town, be allowed aimlessly to carry about sticks, there would be no valid objection to a bye-law which authorises a fine upon any aboriginal native carrying a stick except for what the Court should find to be necessary purposes, or even to a bye-law which authorises the taking from such native of any stick carried under circumstances that might lead to the apprehension of danger to the good government of the

Municipality. In the latter case, however, the stick, unless legally forfeited by judgment of the Court, would have to be returned when the danger is past.

This was an appeal from a judgment of the Eastern Districts Court reversing a decision of the Resident Magistrate of East London in an action in which the present respondent (plaintiff in the Magistrate's Court) sued the appellants for the restoration of a walking-stick or its value 10s.

In answer to the plaintiff's summons the defendants pleaded:

1. The general issue.

2. Specially, that they and their officers, Police-Constable Ashdown and the Inspector of the East London Municipal Police, acted justly and lawfully in this matter, and in accordance with the powers and privileges vested in them by the provisions of section 282 of the bye-laws, rules, and regulations of the Municipality of East London, framed in terms of section 88 of No. 28 of 1880, which said section 282 reads as follows: "No native shall be allowed within the limits of the Municipality after eight o'clock p.m. except servants, who must be provided with a pass by his or her employer, which pass must be renewed on each occasion of the servant leaving the premises, and must bear the date when granted, and no native shall be allowed at any time to carry any stick or sticks within the limits of the Municipality, except such as may be considered as light walking-sticks, and the Council shall at any time have the right to take away all sticks from natives when it may think fit to do so."

The plaintiff, through his attorney, excepted to plea No. 2, on the ground that the bye-law in question was *ultra vires* and was otherwise illegal, being opposed to the general law of the Colony.

The exception to plea No. 2 was ordered to stand over.

The following evidence was given at the trial:

John Henry Fermor, having been duly sworn, states: I am sergeant in the Town Police. This force is worked under Act 16 of 1857. I know the plaintiff. On the 4th August, 1892, I saw the plaintiff in the Court-yard at East London. He had in his possession the stick now produced. It was taken from him by Constable Ashdown. I call the stick in question a knobkerrie, and not an ordinary walking-stick. It is of native manufacture; the wood is "Umsimbiti" wood. This stick has been in the possession of the police since that date (4th August, 1892). I produce my own stick which I carry about with me. It is a knobkerrie, and is the same class of stick as that taken from plaintiff, and it is of the same wood. If a white

man were to carry such a stick as that taken from plaintiff the police would not take it from him. The plaintiff is a Kafir, and the stick in question was taken from him under the provisions of Municipal Regulation No 282. The kerrie taken from plaintiff is worth 2s. The sticks taken from the natives under this regulation are destroyed by the police. The plaintiff is not a resident at East London, but lives at Newlands, in this district.

Cross-examined: I know the plaintiff very well. He is a young man and a powerful man. The kerrie in question is not what is called a light walking-stick. The kerrie is a very heavy one. The "Umsimbiti" is very heavy wood. I carry my stick about town in a general way, but chiefly at night. I carry this stick chiefly for keeping off dogs. I have been eight years in the Town Police, and during the whole of that time this regulation has been carried out.

Re-examined: Such a kerrie as is produced in this case is a dangerous weapon in the hands of a native, but would not be in my hands, as I would know how to use it, nor would it be a dangerous weapon in the hands of white men generally. The mere fact of a native carrying a kerrie does not render it dangerous, but he is very fond of using it. In this particular case the plaintiff was only carrying it.

By the Court: There are large numbers of natives employed at East London on the wharves, surf-boats, and elsewhere. These natives frequently come into the town, and live in a location adjoining the town. On Saturday afternoons especially there are very many natives in the town who largely frequent the canteens and become more or less intoxicated. In my opinion, it would be an absolute danger to permit such natives to carry kerries in the town. From time to time there have been many assault cases tried in this Court against natives of the town, and the assaults have in nearly every instance been committed with kerries. The police force consists of twenty men all told, and they have to protect a very large area, and I find that enforcing the regulation in question is of great assistance to us. The police have no discretion in the application of this regulation, but must apply it to all natives.

William Mjokoseli, sworn, states: I reside at Newlands, in the district of East London. I know plaintiff. I know the stick produced in this case. I purchased this stick in Natal; I gave 10s. for it. On the 19th July, 1892, I landed at East London with this stick. I left the stick in question behind with James Malgass in East London. In the beginning of August, 1892, I requested the plaintiff, who was coming to East London, to bring it out for me. He afterwards told me why he had not delivered it.

The Magistrate gave judgment for the defendant with costs.

The following are his reasons:

"It is contended for plaintiff that regulation No. 282 is *ultra vires*. The 88th section of Act 28 of 1880, incorporating the Municipality of East London, provides *inter alia* that the Town Council may frame regulations generally as may seem meet for the good rule and government of the Municipality, and the question is whether it is necessary in order to secure such good rule and government that natives shall not, as provided by regulation 282, be allowed to carry sticks within the limits of the town. It is proved by Sergeant Fernor of the Town Police that large numbers of natives are employed at East London on the wharves, surf-boats, and elsewhere, that they live in a location adjacent to the town, and frequently come into the town, especially on Saturday afternoons, when they crowd the canteens and become more or less intoxicated, and that under such circumstances it would be an absolute dargher to permit such natives to carry kerries and sticks within the town. I am therefore of opinion that in the interest of good rule and government it is absolutely necessary that no native shall be allowed to carry a stick within the limits of the town. Such being the case, I hold that the Act gives the Council power to frame the bye-law in question, and the police were therefore acting legally and properly in dispossessing the plaintiff of the stick in question."

From this judgment the plaintiff appealed to the Eastern Districts Court, which reversed the Resident Magistrate's decision, and altered it to judgment for the plaintiff for return of his walking-stick, or in default, the payment of its value (10s) with costs.

From this latter judgment the Municipality now appealed.

The Attorney-General was heard in support of the appeal.

He contended that the validity of the bye-law depended:

1. Upon whether it was authorised by statute, and

2. Whether it was fair and reasonable, and seemed meet for the good rule and government of the Municipality.

He discussed these points at considerable length, referred to the evidence of Fernor given above, and cited the following authorities: Act 28 of 1880, section 88; "Municipality of Graham's Town v. Ford and Jeffreys" (3 Menz., 506); "Barling v. Town Council of Cape Town" (Buch., 1875, p. 101); "Queen v. Vandaan and April" (2 App. Cases, 115); "Hall v. Municipality of Victoria West" (2 Juta, 118); "Cradock Municipal Commissioners v. Du Plessis" (2 M.D.O., 407); and "Edmonds v. The Master and

Senior Warden of the Company of Watermen and Lightermen" (24 L. J. C.L.M.C., 124).

Mr. Juta for the respondent: Whether the whole regulation is illegal or not the Municipality have no right to confiscate property, and on this ground alone the appeal must fail.

The Chief Justice said: Considerable reliance was placed in the Eastern Districts Court upon the judgment of this Court in the case of the *Queen v. Robertson* (ante 285) but I must point out that the cases are not quite analogous. There is a vast distinction between the powers conferred on the defendant Council by Act 28 of 1880 and those entrusted to Licensing Courts under the Liquor Licensing Act of 1888. The duty of a Licensing Court is confined to the consideration and determination of applications for or relating to the granting, renewal, or transfer of licences for the sale of intoxicating liquors. It has no power to frame general regulations for carrying out the provisions of the Act, nor can it exercise functions not specially conferred on it by the Act.

If under the Act licensed dealers have been authorised to sell liquors to the public, a Licensing Court cannot, without express authority conferred on them, confine the sale to a special class of persons. So far as Licensing Courts may impose conditions in reference to the nature of the premises used for the retail of liquors, this Court has always as in *Pearson's Case* (3 Juta, 868) given a liberal construction to the Act. The powers of the defendant Council under its Act of Incorporation are very wide. Among the many subjects of Municipal Government for which it may provide it is empowered to make such bye-laws as "may seem meet for the good rule and government of the Municipality."

It has been proved to the satisfaction of the Magistrate that there are large numbers of aboriginal natives within the Municipality and that it would be dangerous for its good government to allow them aimlessly to carry about sticks.

There would therefore be no valid objection to a bye-law which authorises the imposition of a moderate fine on any native carrying about within the Municipality a stick beyond a certain thickness except for what the Court should find to be necessary purposes. Nor should I see a valid objection to a bye-law which authorises the taking from such native of any stick carried by him under circumstances which might reasonably lead to the apprehension of danger to the good government of the Municipality.

In the latter case, however, the stick should only be forfeited, if forfeited at all, by order of the Magistrate and, if not so forfeited, ought to be restored to the owner when the danger is past.

The bye-law, however, with which we have to deal goes very much further. "The Council" so

reads the bye-law "shall at any time have the right to take away any sticks from natives when it may think fit to do so." The consequence is that whilst the plaintiff was peacefully employed in the yard of the Magistrate's Court his stick, valued at ten shillings, was forcibly taken from him by a police constable, acting under the authority of the Council, and when he demanded back his stick the Council refused to give it.

The object of this action was to recover the stick or its value. In my opinion the bye-law goes beyond what is reasonably required for the good government of the Municipality.

Under that bye-law a native quietly and peacefully carrying a bundle of clothes exposes himself to the violent seizure of his stick and a forfeiture of his ownership thereof without any judicial condemnation. Wide as the powers of the defendant Council may be they are not, in my opinion, wide enough to embrace the framing of such a bye-law.

The appeal against the judgment of the Eastern Districts Court must therefore be dismissed with costs.

Mr. Justice Buchanan concurred on the same grounds. His lordship did not think that a regulation which was useful for the good government of a municipality was necessarily *ultra vires*, because it affected natives only. The bye-law was badly framed and unreasonable in its present form. His lordship referred incidentally to the unnecessary expense of printing six pages of purely formal matter in the record.

The Chief Justice hoped the taxing officer would take notice of the remarks made by his brother Buchanan.

[Attorneys for the Municipality, Messrs. Fairbridge & Arderne; Attorneys for the Respondent, Messrs. Van Zyl & Buissinné.]

BOOSE'S TRUSTEE V. BOOSE. { 1892.
Nov. 28th.

Insolvent—Assets—49th section of Insolvent Ordinance—Work and labour—Letters Patent.

An insolvent, having since his insolvency invented a process for a certain manufacture, obtained letters patent for his invention.

Held, that the trustee of his insolvent estate could not claim the right to the patent as part of the assets of the estate.

Mr. Juta moved to make absolute the rule nisi for the attachment of insolvent's half-share in a certain patent in respect of the production of a

material for the manufacture of pipes, in order that the trustee might deal with the same as an asset of the said insolvent estate.

Mr. Juta referred to section 49, Ordinance 6 of 1848, and contended that the patent in question was not the hire, wages, or reward of respondent's work and labour within the terms of the section.

Mr. Boose defended his own case, and upon oath deposed that the patent was the joint invention of Mr. Dawson and himself. They were living together in Johannesburg, and the idea occurred to them. They took five months to complete the invention. They had claimed protection in the Transvaal, Free State, and Natal, but since coming to Cape Town the protection in those countries had lapsed, and a fresh application would now have to be made. Dawson and he had an equal share in the invention, but Dawson had sold his interest and had not been paid for it. Witness believed that if his share were made over to his estate the trustee would simply sell the whole patent, and it would eventually go into the hands of a small syndicate which wanted to get it for nothing. He would only be too glad to pay his creditors in full out of the first proceeds of his share.

By Mr. Juta: About a fortnight ago, before the account was lodged, I offered to cede two-thirtieths of my interest in the patent to my trustee.—Q. You are aware that an account was framed and gazetted?—A. I saw it in the Master's Office.—Q. You saw that it brought up the payments as if the creditors had been paid in full?—A. Yes, the sole creditor.—Q. What does it matter to you to whom the cession was made?—A. I prefer to do the thing straight.—Q. What do you know about chemistry?—A. Nothing very much. I only studied it when we were practising on this invention. I do not know what Mr. Dawson does: I am not aware that he does anything.—Q. The idea struck you about the same time that sand and sulphur would make a good material for pipes?—A. We talked matters over and Dawson knew something about chemistry.—Q. What are you going to float this for?—A. I am not sure; something like £150,000 or £100,000.

By Sir Thomas Uppington: I did not take any steps in regard to this invention till after my insolvency. I never thought of it before.

The Chief Justice said: I granted the rule in the hope that the question whether the trustee is entitled to the patent as an asset of the respondent's insolvent estate would be fully argued by counsel on both sides. The respondent has not employed counsel; but after giving full consideration to the arguments of the applicant's counsel, we are of opinion that the rule ought not to be made absolute.

It is quite true that the 49th section of the Insolvent Ordinance disqualifies the insolvent from acquiring property as against the trustee

after sequestration and before the confirmation of the account, but the same section introduces exceptions to this disqualification.

An insolvent may receive, sue for, and recover in his own name and for his own personal and exclusive use, and free from the control of his trustee, the hire wages or reward of his work and labour, and any property purchased by him with money receivable by him as such hire wages or reward. It follows, that he is entitled to retain as his own any property which he has, since his insolvency, acquired without any suit but as a direct result of his work and labour.

The respondent, by his own work and labour, has invented a process for the manufacture of a certain kind of pipes. That invention is the creation of his own brain, assisted no doubt by his co-inventor, and for that invention he has obtained letters patent. Those letters patent constitute the reward which he has actually received for his work and labour, and, in my opinion, are as much protected by the concluding portion of the section as any wages would have been, if received for working out the invention.

No question can arise at this stage as to execution under the 137th section of the Ordinance.

The rule will therefore be discharged.

[Applicants' Attorney, C. C. Silberbauer.]

TOWNSEND V. BOOSE AND DAWSON. { 1892.
Nov. 28th.

Patent—Sale of share—Interdict.

This was another application arising out of the previous case.

Mr. Juta asked the Court to make absolute the rule nisi restraining the respondents from dealing with more than two-third shares of the patent issued to them on the 30th July, pending an action to be instituted by the applicant for a declaration of rights.

Mr. Boose informed the Court that he and Mr. Dawson had sold a third share in their patent to Mr. Townsend for £150 to enable him (Boose) to come to Cape Town and have the patent registered and protected. He had only received £85, and on his arrival in Cape Town Mr. Townsend's agent refused to pay him the balance of £85. He was prepared to carry out the terms of his agreement on receiving this sum.

It appeared, *inter alia*, from the affidavit of Mr. G. Montgomery Walker (the applicant's Cape Town attorney) that he had not advanced the sum of £85 to Boose because his instructions were to advance the said sum as required for patent purposes only, that the said Boose when he first interviewed deponent made no demur to this

course being followed and promised to fully instruct deponent, which he had wholly failed to do, and because deponent was advised by Dawson (the formal respondent) that he was in full accord with Townsend.

That applicant was still ready and willing to hand over the said sum of £87 on delivery to him of a statement of expenditure and of what was done, and on his name being duly entered in the register of proprietors of patents as a co-proprietor.

That on the 30th July, 1892, the said Boose took out Letters Patent in the names of himself and the said Dawson.

That deponent was informed that the said Boose professed to repudiate all interest of the applicant in the said patent and was now treating for the disposal thereof on the basis of possessing a half-share therein, and that through his instrumentality an offer had been made to the said Dawson for the purchase of the other half-share therein, and that the said Dawson had stated that he was not entitled to sell more than one-third share in the said patent, recognising the claim of the applicant.

That the position of the applicant was that his name did not appear either as co-patentee or as co-proprietor in respect of the said Letters Patent so obtained by Boose and which were the Letters Patent in which applicant claimed a third share, and that the said Boose repudiated the right of the applicant to claim a third in the said Letters Patent, notwithstanding that he had already paid £85 into the said venture, and had always been ready and willing to pay the further £85 in terms of the agreement of the parties.

That there was danger to fear that the said Letters Patent might at any moment be transferred away so far as the said Boose was concerned, to the great hurt and detriment of the applicant, unless means were adopted to prevent such transfer pending an action to be instituted by the applicant.

The Court made the rule absolute. Cos's to abide the result of the action.

[Applicant's Attorney, G. Montgomery Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 1892.
K.C.M.G. (Chief Justice), Mr. { Dec. 1st.
Justice BUCHANAN, and Mr. {
Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

WILMOT V. JOSEPH SILVERSTONE.

Mr. Shell moved for judgment under rule 829 for £28 2s., being the amount of cash advanced and work and labour done.

Granted.

K. B. MAATSCHAPPY V. JACOBUS FRANCOIS DU TOIT.

Mr. Graham asked for judgment under rule 829 for £2 10s., with interest from 31st May, 1891.

Granted.

FLETCHER AND CO. V. CHARLES AUSTIN WILLIAMS.

On the motion of Mr. Thorne, the Court granted judgment for £8 8s. under rule 829, being the amount due for goods sold.

ADMISSION.

Ex parte LEIBBRANDT.

On the motion of Mr. Thorne, the Rev. Mr. Leibbrandt was admitted as a sworn translator of the Supreme Court.

REHABILITATIONS.

On motion from the Bar, Jacobus Thomas Arnoldus du Plessis was granted his rehabilitation. The application of Hendrik Christian Slabber was refused, leave being given him to apply in six months.

GENERAL MOTIONS.

In re VAN HEERDEN'S PETITION. { 1892.
{ Dec. 1st.

Deed of donation—Renunciation.

Mr. Tredgold moved on the petition of M. van Heerden and her five children, for leave to

petitioners to waive and renounce all benefit under a deed of donation executed in their favour by the first-named petitioner of certain half-share in the quitrent farm Modderbult, in the district of Albert; it being desired to sell the portions owned by two minors (which portions are too small to be practically worked) to a brother, who has already purchased the remaining shares. In 1876 the first-named petitioner made a donation of one-half of the remaining extent of the farm Modderbult to her five children in equal shares, and transfer was duly passed to them. One of the conditions of the deed of donation was that if any of the donees died during minority, or being married died without issue, his or her share should accrue to the survivors in equal portions. At the time of the donation one daughter was married, the remaining four children being minors. Two children are still minors. William Jourdaan, married to the eldest daughter, has already acquired the shares of the two major children, who are now married and have issue. Jourdaan has made an offer of £276 for each of the minor's shares. The farm is valued at £1,850.

M. van Heerden, as natural guardian of the minors, now asked leave to renounce the benefits under the donation on behalf of the minors, and to have the second condition of the deed of donation cancelled. All the parties interested were before the Court, and consented to the application.

The Court granted an order in terms of the prayer.

CLAUSEN V. CLAUSEN.

Mr. Shell moved that the rule nisi admitting applicant to sue *in forma pauperis* in an action against her husband for divorce by reason of his adultery should be made absolute.

The Court made the rule absolute, on condition that satisfactory proof was produced to the Registrar that the respondent had selected 2, Church-square, Cape Town, as his *domicilium citandi*.

RYMER V. SOLOMON. { 1892.
{ Dec. 1st.

Magistrate's Court—Appeal—Reasonable time—Act 20 of 1856—Bar to further proceedings in appeal.

A party noting an appeal to a Superior Court against a judgment of a Magistrate's Court should prosecute his appeal within a reasonable time, failing which the opposite party is entitled to an order barring further proceedings in such appeal.

It is no excuse for delay on the part of the appellant that the successful party did not obtain a direction from the Magistrate, in terms of the 33rd section of Act 20 of 1856, either as to the execution or as to the suspension of the judgment.

A delay on the part of a defendant from July, 1891, to December, 1892, held so unreasonable as to entitle the plaintiff, who had obtained judgment in his favour, to an order debarring the appellant from proceeding with his appeal.

An appeal should be set down for hearing for as early a date after the expiration of fourteen days from the noting of the appeal as is compatible with the state of business in the Superior Court.

Mr. Graham appeared for applicant, and moved for an order debarring the respondent from prosecuting the appeal noted in the suit between the parties by reason of his failure to proceed therewith.

The facts are as follows: On the 10th July, 1891, applicant took proceedings in the Resident Magistrate's Court of Cape Town in an action against the respondent for trespass by reason of the respondent having entered applicant's house with four men on the 4th May, 1891, and wrongfully and unlawfully (as it was alleged) removing his furniture. Judgment was given for applicant for £5 with costs. On the 14th July, 1891, an appeal was noted by the respondent through his attorney, and the necessary sum deposited with the Clerk of the Court. Between the noting of the appeal and the present date the respondent had done nothing to prosecute the appeal, and the applicant alleged that he was debarred from obtaining a settlement of the judgment and costs.

The applicant now prayed that the respondent might be debarred from prosecuting the said appeal, and that he might be ordered to pay the costs of the present application.

The respondent in his affidavit alleged, *inter alia*, that he had not proceeded with the appeal, as he felt convinced that in the event of his obtaining a reversal of the decision of the lower Court he should not be able to recover the costs of the appeal from the applicant. He denied that the applicant had been debarred from obtaining a settlement of his judgment and costs, and alleged that he (respondent) was ready and willing to pay the amount upon the applicant's furnishing security as required and provided for by law for restitution in the event of the judgment obtained by him being reversed on appeal, and in conformity with

and in execution of such judgment as should be given in respect of such appeal. He further alleged that until such security had been furnished he did not consider himself compelled to put himself to further expense.

The applicant's agent in an affidavit alleged that the applicant had never been able to give or obtain security for the issue of the execution in the lower Court, and that the respondent never had any reason for delaying his appeal.

Mr. Graham was heard in support of the application, and contended that ample time had elapsed to enable the respondent to prosecute his appeal, and not having done so, he should now be debarred from doing so. He cited Van der Linden (Inst., B. 8, Part 1, sections 8 and 4) and "Talbot v. Hay" (1 Juta, 237).

Mr. Searle was heard for the respondent. He contended that the application was unprecedented, because the proper course had not been followed. The applicant could have either sued out his writ on giving security, or he should have applied to the Resident Magistrate to have the judgment suspended (Act 20 of 1856, section 33, Rule 84). There was nothing in the Act, or in the rules framed under it, to oblige a suitor to prosecute his appeal within a definite period, but he forfeited the sum deposited if he did not proceed to judgment (Rule 85). The application should have been made to the Resident Magistrate, and not to the Supreme Court.

The Chief Justice said: It would lead to a gross abuse of the right of appeal if the argument of the respondent's counsel were to prevail. "The law's delay" is often trying enough, but it would be greatly aggravated if no reasonable limit were held to exist to the time within which an unsuccessful suitor in a Magistrate's Court may appeal to a Superior Court. The argument amounts to this, that because the applicant, who as plaintiff in the Court below obtained judgment for £5, did not also in terms of the 33rd section of Act 20 of 1856 obtain a direction from the Magistrate either as to the execution or as to the suspension of the judgment pending appeal, the respondent, who as the unsuccessful defendant noted an appeal, may keep that appeal hanging for an indefinite time. The result of upholding this argument would be that the poorer the plaintiff is the less chance would he have of obtaining the benefit of his judgment. He could not apply for an execution of the judgment because he had not the means of giving security, and he did not apply for a suspension of the judgment because he was willing not to enforce the judgment pending the appeal.

But the obligation still rested upon the respondent to prosecute his appeal with due diligence. By the 33rd rule of the Magistrates' Court fourteen days were given him after noting his

appeal within which he might abandon his appeal and receive back his deposit money. If he did not so obtain it he was bound in terms of the 33rd rule "duly to proceed to judgment," failing which the deposit money could be applied to the payment of the costs incurred by the plaintiff and the surplus was forfeited.

I gather from this rule that the Legislature considered fourteen days after the noting of an appeal as a reasonable time within which the case should be removed into the Superior Court.

The date for which the appeal should be set down for hearing must of course depend upon the time fixed for the sitting of the Superior Court, and upon the state of business in such Court.

In many cases, as where there can be no sitting of the Superior Court shortly after the expiration of the fourteen days, it would not be proof of want of due diligence if such fourteen days were allowed to elapse without setting down the appeal for hearing. In other cases, as where sittings in term give facilities for a speedy decision, it might be unreasonable to allow the fourteen days to elapse without at all events setting down the case for hearing for as early a date as is compatible with the state of business in the Superior Court.

In the present case there can be no manner of doubt as to the unreasonableness of the delay.

The appeal was noted in July, 1891, and now in December, 1892, the proceedings in appeal have not advanced a single stage. The respondent's excuse that he was waiting for the applicant to apply for the execution of the judgment and give the security required prior to such execution cannot avail him.

The application debarring the respondent from further proceeding with his appeal must be granted with costs.

[Applicant's Attorney, John Ayliff; Respondent's Attorney, C. C. Silberbauer.]

In re THE CAPE CENTRAL RAIL- } 1892.
WAYS. } Dec. 1st.

Mr. Searle presented the third annual report of the official liquidator, which was in the following terms:

1. With this report is submitted an account for the year ending 31st July, 1892, and a statement showing the details of the expenditure under each head and of the earnings for each month.

The account has been examined and audited by Mr. E. R. Syfret, a public accountant, and its accuracy certified.

The first year's account showed a balance in hand of £4,770 12s. 6d, which increased to £7,518 8s. 2d, in the second year, and to £10,842 16s. 10d, in this third year.

2. The gross earnings in the first year (and thir-

teen days) amounted to £11,478 5s. 4d., in the second year to £11,164 5s. 10d, and in this third year to £11,949 16s. 11d.

3. The total expenditure in the first year amounted to £6,817 14s., in the second year to £9,325 12s., and in this third year to £8,617 8s. 8d., the actual working expenses being respectively £5,408 18s. 11d., £6,828 9s. 7d., and £7,864 2s. 9d. The increase under this head in each year arises from the fact that at first, under the supposition that the liquidation would be of short duration, only work of an ephemeral nature was undertaken, but as time went on it became necessary either for the safety of passengers or for the preservation of property to do more

4. The balance, £10,842 16s. 10d., shown as in hand on July 31, 1892, was held thus:

On current account in Standard Bank, Robertson	...	...	£242 16 10
On deposit (bearing interest) in Standard Bank, Cape Town	...	...	10,500 0 0

5. Mr. Langton Thomas, to whom a sale of the line was sanctioned by the Chancery Division of the High Court of Justice in England and by this Honourable Court, having made default in the payment of the purchase money and fulfilment of the terms of his contract, an order was granted by the said Chancery Division of the High Court on the 21st May last, declaring the sum of £5,000, deposited by the intending purchaser, absolutely forfeited to the vendor, and the said agreements void.

6. Negotiations were subsequently entered into for the sale of the property to a new company, with the sanction of the Chancery Division of the High Court in England, the details of which will shortly be reported to this Honourable Court, and its assent asked to the proposed arrangement.

7. In submitting this report, the official liquidator prays that an amount be awarded to him as remuneration for his services, and for office expenses for the year ending 31st July, 1892.

(Signed) THOMAS C SCANLEN,
Official Liquidator.

The Court made the usual order as to publication, and fixed the remuneration of the official liquidator at £600 for the past year.

In re INSOLVENT ESTATE VAN EEDEN.

On the motion of Mr. Molteni, Mr. Osler was appointed provisional trustee pending the appointment of a duly-elected trustee.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.O.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.O.M.G.] 1892.
Dec. 5th.

REGINA V. LAKBY.

In this case, which came up for review from the Assistant Resident Magistrate of Victoria West, Mr. Justice Buchanan said the prisoner (a boy) had been charged with the theft of sheepskins, was found guilty, and sentenced to two weeks' imprisonment and ten cuts with a cane. On looking over the evidence of the boy's master it appeared that the lad was fully seventeen years of age, and the Acting Magistrate was requested to state under what statute he had administered the punishment. He stated that he considered the lad fifteen or sixteen years of age, and not wishing to keep the lad in gaol for too long a period with criminals, he passed the sentence of ten cuts with a cane. The sentence as to the cuts would have to be quashed; otherwise the sentence would be confirmed.

In re BODWELL'S INSOLVENT ESTATE.

On the motion of Mr. Juta, Mr. O. Mason was appointed provisional trustee.

BICCARD V. BICCARD AND FRYER. { 1892.
Dec. 5th & 6th.

Adultery—Divorce—Damages—Joinder of defendants—Collusion.

It is competent for a plaintiff in an action for divorce against his wife on the ground of her adultery to join the adulterer as co-defendant and sue him for damages.

The fact of a husband not suing his wife for divorce is not an absolute bar to his claim for damages against the adulterer, but it raises a presumption of collusion which ought to be rebutted by satisfactory evidence to the contrary.

The treatment of the wife by the husband before her adultery is an important element in the question as to the damages to be awarded against the adulterer.

The case of *Nanto v. Malgass* (5 Juta, 108) commented on.

Mr. Juta and Mr. Molteno appeared for the

plaintiff, and Mr. Shell and Mr. Webber for the defendants.

This was an action for divorce, instituted by Mr. John Josias Brink Biocard, an attorney of the Supreme Court practising at Calvinia, against his wife on the grounds of her adultery with the co-defendant, Dr. Richard Charles Fryer, against whom £1,000 damages were claimed.

The declaration alleged that the various acts of adultery complained of were committed by the defendants during the months of June, July, August, September, and October, 1892. The plaintiff claimed: (a) A decree of divorce; (b) custody of the children, the issue of the marriage; (c) forfeiture of the benefits arising from the marriage in community, and against the co-defendant he claimed the sum of £1,000 damages, alternative relief, with costs of suits.

Both the defendants excepted to the declaration on the grounds:

That they should not have been joined in the same action, but that a separate action should have been instituted against the co-defendant for damages.

The co-defendant excepted to the declaration on the grounds:

That it was not competent in law for the plaintiff to obtain judgment against him (the co-defendant) for damages until he (the plaintiff) should have obtained a decree of divorce dissolving the marriage now subsisting between him and his wife.

In case the above exceptions were overruled, but not otherwise, the defendants denied the allegations of adultery contained in the declaration, and prayed that the plaintiff's claim might be dismissed with costs.

The first-named defendant (Susan Martha Maria Biocard) specially pleaded in answer to the allegations of adultery alleged in the declaration:

That in the event of the Court finding that the facts alleged in the declaration were true, the same gave rise to no cause of action against her, inasmuch as the plaintiff committed adultery with some woman or women to her (the defendant) unknown on various occasions during the years 1890, 1891, and 1892. Wherefore she prayed that the plaintiff's claim might be dismissed with costs.

The first-named defendant claimed in reconvention: (a) A decree of divorce; (b) custody of the children; (c) alternative relief, with costs of suit.

The replication was general, and on these pleadings issue was joined.

Mr. Shell was heard in support of the exceptions, and contended that the practice had always been to sever the actions in cases in which a claim for damages was made against a co-defendant, and that the first case in which the old practice was departed from was in the case of "*Oliver v.*

Oliver and Peekover" (1 O.T.L.R., 51). In Oliver's case no exception was taken to the form of action, and consequently the question was not raised. The co-defendant was not represented by counsel, and the point was not argued, so that Oliver's case could not be considered as settling the practice. The same remarks applied to the subsequent cases of "Cartwright v. Cartwright and Mason" (*ante* 342) and "Marriott v. Marriott and Haign" (*ante* 348). The second exception was founded on the judgment of the Court in "Wagner v. Kotzé" (decided in 1865) and "Nanto v. Malgass" (5 Juta, 109). After the judgment in "Nanto v. Malgass," Ringham's case could not be regarded as a precedent.

The Chief Justice said the only exception that called for decision was the first—that the two defendants could not be sued in the same action. His lordship was of opinion that this exception ought not to be sustained, as no possible injury could be done to either defendant by joining them as defendants in the same writ. If there had been adultery between them, then they were co-partners in their guilt, and they were properly joined together in the action. A further question might arise, whether damages could be given as against the co-defendant if the plaintiff should not succeed in obtaining a decree of divorce against his wife. They would have to consider that upon the merits. They would hear what evidence was given—whether adultery was proved or not—and also whether plaintiff's alleged adultery was proved or not; and then the Court would be in a better position to decide as to whether damages ought to be given against the co-respondent.

Mr. Justice Buchanan concurred. He said not only could no injury be done by joining the defendants, but it was advisable that the two parties should be sued in one action, so that all the facts might be gone into.

John Josiah Brink Biocard was then called. In answer to Mr. Juta, he deposed: I am an attorney, and have been practising at Calvinia for some years. I was married to the defendant on the 11th August, 1887, in community of property. There are two children of the marriage, both boys; one going on for five years, and the other fifteen months. The co-respondent, Fryer, is the doctor at Calvinia, and was our doctor during 1891-92. We were on very intimate terms with him. Within the last seven months Mrs. Biocard has been of intemperate habits. One night some seven or eight months ago I was playing billiards in the hotel at Calvinia with some friends and Dr. Fryer. The doctor suddenly left. I afterwards followed, and found the co-respondent on the stoep with my wife. I said, "Hullo, what is this?" He said, "I have only come down to ask you and Mrs. Biocard to join us in a game of cards." I said I would not go. Dr. Fryer and I afterwards

arranged to go to the Kimberley Exhibition together. On the night of the 19th October I found my wife and Fryer at the back of my house committing adultery. When I came out Fryer jumped over the wall and ran to his surgery. I followed him and said to him, "Doctor, you have deceived me with my wife." I afterwards went back to the house and found Mrs. Biocard in the kitchen. She asked me to forgive her. I slapped her. I told her to leave my house. She fell down at the front door. I said, "See how you have served me." She said, "I simply sent for the doctor to tell him not to come over to the house again." I slapped her. Dr. Fryer then came in and said, "My God! you don't strike that woman again." I ordered him out of the house. He was not sober. He caught me by the wrists and we fell down on the stoep. I said to him, "Now, you take that woman away; not my wife, but yours." I then went to Mr. Van Dyk's house, and woke him up and told him all the circumstances. He went with me to the house, and we took the children and the servant and looked up the house. I slept at Van Dyk's that night. In the morning Mrs. Biocard was sent off to her mother in Cape Town. She seized both the children and took them with her, and has kept them since. She called upon me afterwards at the Central Hotel, but she only asked me to forgive her.

Cross-examined by Mr. Sheil: My life with my wife was until recently a very happy one. I don't think I am jealous. I was particularly fond of my wife. Before the 19th October I had reason to accuse my wife of having had undue familiarities with Dr. Fryer. I have given him "good for" for £120. I am of temperate habits. I am not strongly addicted to drink, though I have enjoyed myself. I have never kicked my wife. I have never struck her. I have boxed her ears. I remember thrashing the groom and Mrs. Biocard interfering. She had no right to interfere, so I gave her a slap. On the 31st December, 1891, I went to the town fireworks in Calvinia, and on coming home I had a row with my wife, because she took Dr. Fryer's hand at the fireworks.—Q. Why did you arrange to go to Kimberley with Dr. Fryer when you knew of his relations with your wife? Is that what a man does who suspects that another man is paying undue attention to his wife?—A. Well, I did it.

I never had any improper intercourse with any of the servants at the hotel in Calvinia. When I was in Cape Town in January, 1891, I was perfectly faithful to my wife. I was not suffering from a venereal disease. I had a wart on my private parts and Fryer gave me some iodoform to apply to it because it had bled, but I only used the powder once. Regarding the 19th October, it was a dark night. I was about three yards off

when I saw Fryer and my wife. I swear that I never threatened the servant if she did not come and give evidence against Mrs. Biocard that I would beat her.

By the Chief Justice: How many times did you slap your wife before this date?—A. Very rarely. She was not beyond flying at me. She struck me often. She has a very bad temper.—Q. I understood you to say that you lived a very happy life with your wife?—A. Yes, until within the last seven months. I never ordered the servant to put out the light that night in the front rooms.

Marthinus van Dyk, storekeeper, Calvinia, deposed that he knew the parties to the suit. He remembered Biocard coming to his house about eleven o'clock on the 19th October. Saw marks on the wall behind Biocard's house as if some one had jumped over. Biocard fainted in the house, and he took him and the children to his house. He saw Fryer some time after at his surgery and asked him, "What business have you got with another man's wife on his own property?" Fryer said Mrs. Biocard had sent for him in order to tell him how her husband ill-treated her, and added that the only mistake he had made was in running away. Fryer said, "I swear to God I never touched the little woman last night," but admitted that he had on the previous Tuesday. Witness told him he had better get ready to go, as all the people were against him. The doctor said, "I won't clear, because I've got a good practice here." Dr. Fryer was a tenant of witness's. The doctor made £1,200 a year. He had no opposition. Mrs. Biocard was always well treated by her husband as far as witness knew.

Cross-examined by Mr. Sheil: He knew that a public meeting was called in Calvinia to denounce Dr. Fryer. Witness convened the meeting. Dr. Fryer was away.—Q. Do you think it was a manly or honourable thing to do when the man who was to be denounced was absent?—A. I think it was quite fair. During Dr. Fryer's absence witness had communicated with him, telling him of the feeling in the village, and in consequence of that feeling the meeting was called. About twenty attended. Those who wanted Dr. Fryer back were asked to hold up their hands. None were held up. Those who did not want him back were asked to hold up their hands, and they were unanimous that they did not want him to return.—Q. You condemned Dr. Fryer unheard?—A. There was nothing to hear. Witness never saw Mrs. Biocard under the influence of drink.

Richard H. Will, bookkeeper to Mr. Van Dyk, Calvinia, knew the parties to the suit. He carried two notes from Mrs. Biocard to Dr. Fryer. She told him they were for headache powder. Witness saw one of the letters. It ended: "Good night, my dearest sweetheart." A whole lot of

crosses appeared at the end of the letter. On one occasion when Mr. Biocard was away he saw Dr. Fryer and Mr. s. Biocard in the dining-room; the co-defendant's person was unadjusted. Fryer said, "For God's sake, don't you speak to one man; keep it as dark as you can." After seeing this witness told Mrs. Biocard that he did not wish to carry any more notes to the doctor. He however, took another note, which he understood to be for headache powders. Fryer opened it, and he said, "Look here! By —, what a woman!" It was a loving note, and ended, "I remain, your own Susie." After that he took the opportunity of warning Mr. Biocard. He told him he must watch Fryer, as there were things going on which were not straight. Mr. Biocard said, "I have every confidence in my wife; I won't believe you."

Cross-examined: Witness was attached to Mrs. Biocard's sister, but he did not blame Dr. Fryer because the engagement was broken off. Witness was very glad he was out of it.

Andrew Stoffberg, blacksmith, Calvinia, deposed to having seen the defendant and co-defendant enter the stable in the back garden. Dr. Fryer had spoken to him about these proceedings in court. He said, "You see that I am down and you all tread on me." He offered witness £10 if he would stay away.

Nicholas Ley, blacksmith, Calvinia, remembered the 22nd June, when he saw Mrs. Biocard enter the doctor's surgery.

Cross-examined: It was not an unusual thing for ladies to go into the doctor's surgery.

Charles Johnston, a clerk in plaintiff's employ, spoke to having seen Dr. Fryer at the house frequently when Mr. Biocard was away. He remembered on one occasion going into the dining-room and surprising them.

Cross-examined: The dining-room door was opened, and he saw Mrs. Biocard very much flushed.

Anthony P. Keyter deposed to having received a statement from Stoffberg about three months ago as to matters now in issue.

Harvey Witbooy, groom in the service of Mr. Biocard, deposed that he had bought brandy for Mrs. Biocard, sometimes as many as three bottles a week. He carried a note to Dr. Fryer on 17th October.

Cross-examined: Witness got some of the brandy. Had never seen his mistress drunk nor his master.

Mr. Juta put in the correspondence at this stage and closed the plaintiff's case.

For the defence, Dr. Richard Charles Fryer deposed: I am a medical practitioner at Calvinia, and know plaintiff and defendant intimately. Biocard has been a very intimate friend of mine for some time. In my opinion he is of a very jealous disposition. I have known

him guilty of great cruelty to his wife on several occasions. I am aware that he accused his wife on several occasions of undue familiarities with me. On two occasions I have seen Mrs. Biocard with marks of violence on her face. On the 4th November, 1891, I received a note from Biocard asking me to come over and see his wife. The left side of her face was swollen. On another occasion, some time this year—one Sunday morning—I saw Mrs. Biocard looking very miserable. Her lip was out as if the blow had been inflicted with a clenched fist. In June, 1891, witness prescribed for Biocard, who was suffering from gonorrhea and soft chancre. Witness advised plaintiff not to sleep with his wife until he was all right. On the 20th October last Biocard and I were to start for Kimberley. I received a note from Mrs. Biocard on the night before, saying, "I want to see you. The lights have been extinguished in the front room, so come to the back. I am working there. Excuse me troubling you—Yours sincerely, S. Biocard." I went down with Mrs. Biocard's servant, who brought the note. I told the servant to tell Mrs. Biocard I was there, and I had to wait a little while before she came out. I was leaning against the wall. Mrs. Biocard came out and told me how her husband had been ill-treating her ever since I had been to dinner eight or ten days before. She told me to be careful what I said on the way to Kimberley, as anything that was said would recoil on her head. She also asked me about the measles. There was an epidemic in the district at the time, and she was afraid the children would become ill. I had hardly told her what to do in a case of measles when Biocard rushed out of the kitchen door and I bolted over the wall, and unfortunately I cleared. I knew Biocard was very jealous, and that was why I went away and why I saw Mrs. Biocard outside.

By the Court: Why didn't you meet her in the kitchen?—A. I never thought of that.

It was a curious place to meet a patient, was it not?—A. I did not go to meet her as a patient.

Examination resumed: When Biocard came up to my place and accused me of having had familiarities with his wife, I told him it was a damned lie. Between the time I left the surgery and the time I returned not more than five minutes would have elapsed. As to Mr. Van Dyk's statement, it is false, and I positively deny it on oath. I am not on the best terms with Van Dyk's family, and as a matter of fact, he has given me notice to quit his house. As to what Will said, he only carried one letter, in which Mrs. Biocard asked for some powders, and in which she told me she was very unhappy. As to the stable incident, I cannot recollect being in the stable. Mr. Stoffberg, who

says so, rejoices in the title of the "universal witness" down Calvinia way. As regards the offer of £10, I characterise it as an abominable falsehood. Mrs. Biocard did one or twice come to my surgery, but never for more than five minutes at a time.

Cross-examined by Mr. Juta: My books show that I made £880 last year. I became the family doctor of the Biocards in May, 1891, and have been a constant attendant at the house. I went there as a friend, and I had patients in the house on the other side, and used to call in on my way. Before the 19th October I had received a few letters from Mrs. Biocard. They were orders for powders, eyewash, and other medicines. I only once met her at the back-door of her house. That was on the 19th October, about 9.30 p.m. I had seen her three times that day, only for a few seconds at a time. Will's statement with regard to the dining-room is false. Ley is mistaken in what he says, though I don't think he meant to tell a falsehood. Biocard, on the evening in question, was drunk.

Mr. Searle at this stage put in an affidavit from Dr. Smuts, saying he was unable to attend and give evidence on account of the state of his health.

Susan Martha Maria Biocard (the defendant) deposed that she married plaintiff in August, 1887, and lived in Cape Town for twelve months after the marriage; they then went to Calvinia. Her life had been a very unhappy one since the second year of their marriage, on account of her husband's intemperate habits and cruelty. He had frequently assaulted her. He did so in 1890 one night when her little boy was ill. He kicked her. On another occasion, when her husband was thrashing the groom, she interfered, and he struck her on the mouth, saying, "Go out of this; you have no business here." On another occasion, when they had guests in the house, he cursed and swore at her and called her disgusting names, and hit her, and took a gun and said he would shoot the doctor. She remembered her husband going to Cape Town in January, 1891, and on his return he occupied a separate bed. She noticed that he was taking medicine and using a yellow powder and she spoke to him about the matter. Witness never misconducted herself with Dr. Fryer. She sent for him on the night of the 19th October to tell him how her husband had ill-treated her. She intended going away. When her husband accused her of misconduct she denied it. Witness had never drunk brandy, and was not in the habit of drinking. The boy had gone for brandy, which he drunk himself. The statement that Dr. Fryer had been found in the dining-room with her was a lie. She had never been in the stable with Dr. Fryer. Her husband was exceedingly jealous of any gentlemen coming to the house. She was

anxious to get a divorce from her husband, and anxious to get the custody of the children.

By the Court: Why didn't you go to the kitchen on the night of the 19th October?—A. I didn't like to ask Dr. Fryer into the kitchen, and I couldn't have him in the front rooms, because the lights were out.

Mr. Juta: In short, you wanted to speak to Dr. Fryer in a place where your husband couldn't see you?—A. Yes.—Q. Did you ever send Dr. Fryer a rose?—A. No.—Q. Is this not the sweet token you sent to him? (Rose produced.)—A. No; I never sent him any roses. Continuing, witness corroborated Dr. Fryer's statements, and added that she was locked out of the house on the night of the 19th October but got in when her husband and Mr. Van Dyk left.

Catherine, the servant who took the note to Dr. Fryer, said she had never seen any improprieties between the doctor and her mistress.

Elisa Peters, a servant in the Calvinia Hotel, confessed to having permitted Mr. Biocard to have undue familiarities with her. That occurred in July of this year.

Wm. W. Eustice, who was in the doctor's surgery on the night of the 19th October, stated that the doctor was not absent more than five minutes. Biocard's house would be about 200 yards from the surgery. The doctor was quite sober, but Biocard was very much excited; and had been drinking.

[The case was adjourned at this stage until the following day.]

December 6th.

The further hearing of the case was resumed, the plaintiff being again represented by Mr. Juta and Mr. Molteno, and the defendants by Mr. Sheil and Mr. Webber.

Mr. Juta said that before addressing the Court on the merits of the case it became very important to have the evidence of Dr. Smuts.

The Chief Justice intimated that it was not necessary to speak further on the merits; they did not require the evidence of Dr. Smuts. Counsel could confine himself to the question of damages.

Mr. Juta then addressed himself to the question of damages, and in the first place sought to explain away the charges and allegations of cruelty on the part of the plaintiff. Regarding the tussle with the groom when Mrs. Biocard interfered, it was a struggle between master and servant, and being in a great rage, plaintiff simply struck his wife when she came between them. There was not a tittle of evidence to show that plaintiff practised a course of ill-treatment towards his wife. But supposing there was cruelty, that did not justify Mrs. Biocard's adultery. It was

said plaintiff was of an exceedingly jealous disposition. A man who was of a jealous disposition was just the man who felt most deeply any injury of the sort that had been inflicted.

The Chief Justice: Upon the question of damages, it may be that Dr. Fryer has had a very good practice, but supposing the Court finds that he has been guilty of adultery with one of his patients' wives, it would very seriously injure the man's prospects for the future.

Mr. Juta insisted that this was one of the most monstrous cases that had ever come before this Court. Here was a medical man, trusted in every possible way by the family, a constant visitor at the house, the husband away frequently on business, small children in the house, this man called in to attend them, and while the husband was away he took advantage of his position as a medical man to seduce his patient's wife. The Court ought to indicate its abhorrence of such conduct by awarding substantial and heavy damages. Since Dr. Fryer came to town he had been taking Mrs. Biocard about and feasting on champagne.

The Chief Justice: "Feasting on champagne" is a wide phrase. He gave her champagne at lunch twice.

Sir Thomas Upington: I am not sure that it was a worthy thing to watch him to see what wine he gave the lady.

Mr. Juta remarked that nobody watched them. The matter was all over the town, and people were only too ready to give information.

Mr. Sheil was next heard on the merits. He contended that unless the Court were going to reject the evidence of Dr. Fryer, of Mrs. Biocard, and of Elisa Peters, they must find that the plaintiff had himself committed adultery. The circumstances connected with the alleged adultery of the defendants were most improbable. They had a direct conflict of evidence. Mr. Biocard was anxious to get rid of his wife, and with that view he had instituted these proceedings. He submitted that sufficient evidence had not been produced to satisfy the Court that Mrs. Biocard had committed adultery, nor had the evidence been sufficient to justify the Court in sending Mrs. Biocard and Dr. Fryer away, the one branded as an adulteress, and the other shorn of his honour, his reputation, and everything that a man held most dear. But even assuming that the evidence was sufficient, and that Mrs. Biocard had, unhappily, fallen, then it was abundantly clear that Mr. Biocard had been to a great extent the cause of his wife's unhappy fall. It was clear from the evidence that plaintiff was a man of intemperate habits, and in his drunken fits he had frequently assaulted his wife. He had subjected her to treatment which in this country was certainly unparalleled. He admitted that cruelty was not a

justification in the eyes of the law for adultery, but it was an element which the Court, sitting as a jury, would take into consideration in determining whether it was not the conduct of the plaintiff himself which drove his unhappy wife into the arms of the man who protected her from the brutality of her husband. The grounds upon which damages are given in a case like the present are: (1) The injury done to the husband by alienating his wife's affections, and (2) the loss of the comfort which a man derived from the society of his wife. Who, he asked, had alienated the affections of Mrs. Bloccard? If anyone had done so, it had been the plaintiff himself. With regard to the second ground, what evidence had been produced to show that Mr. Bloccard derived any comfort from the society of his wife? The chief pleasure he seemed to have derived from her society was the brutal pleasure of assaulting her. He had tried to prove that his wife was a drunkard. If she were a drunkard what injury was done to the plaintiff by losing the society of a drunken wife. No jury in the world would award damages to a man who had treated his wife as the plaintiff had, and the Court in any event would only award nominal damages if any.

The Chief Justice said: The first question to be decided is whether the two defendants have been proved to have been guilty of adultery. After stating the facts his lordship added: This question must be answered in the affirmative.

The next question is, whether the plaintiff has himself been guilty of adultery? If he has been guilty he would not only be disentitled to a decree of divorce, but in the discharge of my functions as a juror, I should certainly refuse to award him any damages. After stating the facts, his lordship added: There is no satisfactory proof of adultery on the part of the plaintiff.

The only remaining question is whether any, and if so, what damages should be awarded to the plaintiff? The question whether the two defendants were properly joined as such on the same action has already been answered in the affirmative. The general question as to a husband's right to recover damages from the adulterer with his wife has still to be considered. It is too late—after the many decisions of this Court—to dispute that right. Those decisions have been collected with great industry by Mr. Van Zyl in his very useful articles published in the *Cape Law Journal* on the "Theory of Judicial Practice." In the case mentioned by him of *Wagner v. Kotze* Judge Watermeyer is reported to have said that actions by husbands against persons committing adultery with their wives were unknown in the Dutch law, but if the report be correct the learned judge must have overlooked the remarks of Grotius in his introduction (8, 85, 9). "Whoever,"

says that learned writer and experienced advocate, "commits adultery with a married woman, even with her consent, inflicts an injury on the husband, and is therefore in this respect liable to the husband, besides the compensation for the losses which the husband or children sustain by the same." I adhere, however, to the view which I have frequently expressed in this Court, that every precaution should be taken to guard against husbands obtaining damages for adultery committed with their connivance. Unless the breach between a husband and his adulterous wife is final, I should not be inclined to award damages to the husband for two reasons. There is not that complete loss of the wife's society which constitutes the main element in the estimation of damages, and there remains the strong probability that the husband may be trading upon his wife's dishonour. In the case of *Nanto v. Malgass* (5 Juts, 108) I am reported to have said that "I am by no means satisfied that, under our law, a husband can maintain an action for damages against an adulterer with his wife without suing her for divorce." Further consideration has led me to the conclusion that this ought not to be an absolute bar to his claim for damages. If it were, such a rule might operate unfairly in the case of persons, such as Roman Catholics, who have conscientious or religious scruples against divorce, and who yet have been finally separated from their wives. But although the fact of the husband not suing his wife for divorce is not an absolute bar to his claim for damages against the adulterer, it raises a presumption of collusion which ought to be rebutted by satisfactory evidence to the contrary. In the present case damages are asked for, and the only remaining question is as to the amount. If the plaintiff had himself treated his wife with kindness and consideration, and the second defendant had been proved to be a man of means, very heavy damages would have been awarded. But his own account of his past married life satisfies me that if he had not himself previously treated his wife harshly—I might almost say cruelly—he would not have lost her affection. Besides, the second defendant is a young doctor who would be wholly unable to pay a large sum as compensation in addition to what will probably be very heavy costs in this action. The plaintiff consents to his wife retaining the youngest child of the marriage; and the Court will therefore grant a decree of divorce against the first defendant, with forfeiture of all benefits derived or to be derived from the community of goods, and judgment for £50 damages with costs of this action against the second defendant. The plaintiff to have the custody of the elder child, reserving access at reasonable times and places to the first defendant, and the first defendant to have the custody of the younger

child, reserving similar rights of access to the plaintiff.

[Plaintiff's Attorney, P. M. Brink; Defendant's Attorneys, Messrs. Van Zyl & Buissinck.]

HISKETT V. ARGUS COMPANY. { 1892.
Dec. 6th.

Master and Servant—Wrongful dismissal—
Damages.

Mr. Graham for plaintiff; Mr. Molteno for defendants.

This was a claim for damages at the instance of Herbert Hiskett for £150 against the Argus Printing and Publishing Company for wrongful dismissal.

Herbert Hiskett, plaintiff, deposed that he came to the colony in July. He was a machine-minder, and had worked at Frome, in Somerset, and Unwin's, in London. He arrived here on a Sunday and started work at Richards's on the Wednesday following. He was not dismissed from Richards's. He had a quarrel with Mr. Tomsett, and went over to Mr. Townshend. He heard of a vacancy at Kimberley, and applied at the Argus Company's offices for the job. It was to undertake the duties of a machine-minder. His wages were to be £5 10s. a week. On arrival at Kimberley he went to the *Independent* office, and found he had to attend to four machines, a press, and an engine. The other hands in the machine-room were two white boys and a Kafir boy. They were very old machines, and were out of gearing. A day or two after he arrived he received a note from the foreman compositor, stating that he might be compelled to consider the necessity of terminating his engagement, as he was not fit for the duties he had undertaken. Witness was required to feed the machine, which was no part of his duties. He had also to look after the engine, and no machinist had that to do. On the 9th September he received a note stating that his services would be dispensed with from that date. He had to pay his own fare back to Cape Town. Since then he had tried to get something to do in town, but had failed. He had been engaged by the Argus Company for six months.

Charles Richard Goodspeed, overseer of the printing department of the *Cape Times*, deposed that he had had thirty years' experience at the trade, and had been close on twenty years in the Colony. Hiskett had been introduced to witness to be tried at his own work for a week. Witness had put him on different jobs in the *Times* office, and had found him a very good machine-minder. It was no part of the duty of a machine-minder to wet down the paper, though in this country

a man was expected to be a "Jack-of-all-trades." If he had a vacancy in the machine-room—and he expected to have one when the new machine was laid down—he would not hesitate to give Mr. Hiskett the appointment. He was a competent man.

Louis Charles Lurssen, *Cape Times* office, corroborated the evidence of the last witness.

Arthur Townshend deposed that plaintiff, during the time he was with him, proved himself a very good workman, and left of his own accord.

Walter H. Mitchell, formerly of Richards's, now of the *Cape Times*, deposed to hearing plaintiff and Tomsett having high words over some work. He did not dismiss the plaintiff from Richards's employ.

For the defence,

John Samson, manager of the Argus Printing Company in Cape Town, said plaintiff applied for the situation in answer to an advertisement. He explained to him the nature of his duties in Kimberley, and described the machines he would have to attend.

Cross-examined: Had no practical experience whatever in machinery.

Charles Dimbleby, sub-editor of the *Cape Argus*, deposed that he engaged Hiskett, and explicitly told him what he would have to do. He knew the precise nature of his work before going up.

Henry P. Tomsett, of Richards's Printing Works, knew the plaintiff, and had found him utterly incompetent as a machinist. (Shown some specimens of plaintiff's work at the *Times* office). —Q. What sort of work is that?—A. I would not call it first-class work.

Sir Thomas Upington: Do you call the *Government Gazette* first-class work?—A. No, sir; I don't.

The evidence taken on commission having been read to the Court, and counsel heard.

The Chief Justice said there was no doubt that a contract of service had been entered into between the plaintiff and defendant company. Under the contract of service the plaintiff undertook to proceed to Kimberley on 20th August, 1892, and on arriving there entered the service of the company as newspaper and jobbing machine-minder. After he had been for a short time in the service of the company, he was dismissed for incompetence. He now brought this action for wrongful dismissal, and claimed damages. The defence set up was that plaintiff was incompetent to perform the duties of a machine-minder, and in consequence of that he was dismissed. The onus of proving incompetency lay upon the defendants. There had been some evidence as to what was meant by a machine-minder in this colony, but if the defendant company intended that the term machine-minder should have had the wide meaning which they now wished the Court

to attach to it, they ought to have inserted that in the agreement. They now claimed that the term "machine-minder" should not only include minding the machine, but damping, attending the engine, and feeding and working the handpress. Certainly these appeared to be additional duties which ought to have been stated in the contract so as to give plaintiff a clear notion of what his duties were to be. It was said there was a verbal intimation, but that only illustrated that all the terms should be stated in writing. There was another point against the company. They relied entirely upon the statement made by their own foreman compositor. He might be a good servant of the company, but he was never a machine-minder. He was only a compositor; so that it would have been wiser had they called in some impartial expert to judge as to plaintiff's qualifications before they summarily dismissed him. The evidence was very strong against plaintiff in regard to incompetency, and the evidence of Mr. Tomsett was also strong against him. But on the other side they had evidence of perfect competency. Mr. Townshend, who appeared to have large printing works, had told the Court that he was perfectly satisfied with the manner in which plaintiff had performed his duties as a machine-minder, and if he had an opening now he would give it him. Then Mr. Goodspeed, who appeared to be a very competent man, and had been employed on the *Cape Times* for many years, took in plaintiff in order to give him a fair trial, and he was so well satisfied with his qualifications that he was prepared to give him employment as soon as the new machine was laid down. His lordship thought there could hardly be a better test of qualification than this. Experts very often came to court as party men; but here was a man saying, "I am prepared to take this man in because I am so well satisfied that he can perform these duties of a machine-minder." Now, this man had had no training in the meanwhile, and from the very first he did his duties under Mr. Goodspeed, who, in his lordship's opinion, was a very competent gentleman. Considering the onus of proving incompetence lay upon the defendant company, he was of opinion that the plaintiff had proved his case and was entitled to damages. In regard to the measure of damages, no hard-and-fast rule could be laid down. It seemed that by the middle of January the plaintiff would have occupation again. Rating his wages in Cape Town at £2 10s. a week for sixteen weeks would be £40, and adding £6 for railway fare from Kimberley, the judgment of the Court would be for £46 with costs.

[Plaintiff's Attorney, J. Hamilton-Walker; Defendants' Attorneys, Messrs. Van Zyl & Buissinac.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] 1892. D.C. 7th.

LOUBSER V. VOS.

Sale of land—Oral contract—Condition.

The Court will not enforce any oral contract for the sale of land unless proved by clear and unimpeachable evidence.

A sale of land having been concluded in the presence of the Secretary to a Board upon condition that the Board should, on the following day, decide to advance the purchase price to the purchaser upon security of certain specified properties belonging to him.

Held, that upon the decision of the Board to advance the money being communicated to the purchaser, as the borrower, the condition was accomplished, and the seller was entitled to recover the purchase price, he tendering to effect transfer in due form.

Mr. Sheil appeared for the plaintiff, and Mr. Juta and Mr. Molteno for the defendant.

This was an action for £675, being the purchase price of two erven, with the buildings thereon, situated in Malmesbury, and sold by the plaintiff to the defendant on the 17th October, 1892.

The declaration alleged that on or about the 17th October, 1892, the plaintiff agreed to sell, and the defendant agreed to purchase from him, certain two erven with the buildings thereon, situate in Malmesbury, for the sum of £675, subject, however, to the condition that the Malmesbury Board of Executors should advance the purchase price.

That thereafter the Malmesbury Board of Executors did agree to advance the purchase price on mortgage of the property alleged to have been sold, but that although all conditions had been fulfilled necessary to entitle the plaintiff to obtain payment of the said sum of £675, the defendant refused and still refuses to pay the same, though frequently requested to do so.

The plaintiff claimed:

(a) Payment of the said sum of £675 with interest from 17th October, 1892, he tendering transfer of the property.

(b) Alternative relief.

(c) Costs of suit.

The defendant in his plea denied that there had

ever been a concluded contract, and prayed that plaintiff's claim might be dismissed with costs.

The replication was general, and upon these pleadings issue was joined.

Andrew Jacobus Loubser, the plaintiff, in answer to Mr. Sheil, deposed: On 16th October he had a conversation with Mr. and Mrs. Vos. The latter stated that the owner of their house contemplated selling the property and they might have to move. She asked plaintiff if he would not let her have his house. Plaintiff said he would have to build himself another house if he did sell. She asked the price. Plaintiff said it was Sunday, and she might come on the Monday and they would talk over matters. On the Monday plaintiff went across to Vos's house. There were present the defendant, his brother, father, and mother. Vos asked witness to sell the house. Witness said his price was £700. They asked him to "come down." He told them he would pay half the transfer dues. Defendant said, "£675 and we close." Plaintiff said, "What about the payment?" Defendant said he would get the money from his aunt. Plaintiff suggested the Board of Executors. Defendant said he was obliged for the suggestion; he had never thought about the Board. On the Monday Vos and his son went down together to the secretary's office to ask for the money. There they screwed plaintiff down to £675, and he agreed to sell at that price. They asked the Board for £700, offering as security plaintiff's property and two other houses. Nothing was said as to the rate of interest. Plaintiff also agreed, if the Board granted the money, to pay the interest on £675 until his new house was finished, provided he was allowed to live in his old house. Defendant (Vos, jun.) agreed to return on the following day to hear the resolution of the Board and sign the necessary documents. The Board granted the money. Vos did not call to go down and witness went round to his shop and gave him notice that the Board had granted the money. He said he was too busy to go that day. On the 19th he said he was very sorry he could not go on with the purchase, as his mother would not agree to it. Plaintiff said, "I have nothing to do with your mother." Plaintiff, on defendant's suggestion, visited Mrs. Vos, who said she had looked over the place and there was too little vacant ground on it. She said her son did not need to take transfer as he had not signed the documents. Plaintiff said, "Well, if you say so, I will go to law about it."

Cross-examined: Q You say you were not at all anxious to sell the property?—A. Not in the least.—Q. You did not try to force a sale on them in any way?—A. No. I did not ask them to buy my place; they asked me.—Q. £675 is quite the worth of the place; you could get that at any moment on the market?—A. I don't say I could

now. The purchase price was agreed upon at the Board's offices. Vos refused to sign the documents when he repudiated the sale.

Barend Wethmar, secretary to the Malmesbury Board of Executors, remembered plaintiff, defendant, and his father coming to the office on the 17th October. Old Vos and his son entered, and witness said, "What can I do for you?" They said, "We want to buy Loubser's property if we can get the money." Witness asked if they had agreed upon the amount. Loubser answered £700, and both defendant and his father exclaimed, "You promised to come down to £675." That was the price agreed upon. They asked £700. Witness said the Board never gave the full mortgage, and this amount exceeded the purchase price. Vos said he was going to give two other properties as security. Witness then said he would bring the matter before the directors on the morrow, and Vos promised to come over and sign the document at three o'clock on the following day if the money was granted. It was witness's impression that if the money was granted by the Board the sale was concluded. The matter came before the directors and the money was granted, but Vos never returned to sign the documents.

By the Court: I considered it a simple and definite sale.

Sir Thomas Upington: Is it customary, when people are negotiating for the purchase of property, that they come to the Board and ask what money the Board could advance if they did come to terms?—A. Yes, farmers frequently come and do that.

Hendrik Verueil, who had acted as plaintiff's agent, deposed to having called upon defendant and asked him for the amount of the purchase price of the property, but defendant said he had not bought the property. On the Saturday he tendered plaintiff the transfer and declaration of sale, which he refused to accept.

For the defence,

Catherine Vos, mother of the defendant, deposed that she had heard that Mr. Smuts, their landlord, was going to sell his property. Loubser lived opposite, but they never visited. On the Sunday morning he came over and spoke to her. They spoke about Mr. Smuts's intention to sell his house, and Mr. Loubser said, "You can get mine." Witness told him his place was too small. There was no back yard to it, and she had poultry and wanted room for them. Mr. Loubser called again on the Monday. Her husband asked him if he wished to sell what would be his price. He said £700, and offered to pay one-half of the transfer dues. Her husband asked him to make it £650. Plaintiff said he would make it £670. They told plaintiff that before they could do anything they must see Mr. Smuts.

By the Court: She first discovered on the

Monday that Loubser understood that he had sold the house to Mr. Vos.

Jacobus Vos, defendant, son of the last witness, deposed that he remembered the interview between Loubser and the family on the Monday. They had not received any notice from Mr. Smuts at that time, and they made it clear that they would do nothing until they saw Mr. Smuts. With regard to the money plaintiff said, "You need not buy; you only need to inquire at the Board if you can get the money." Certainly there was no sale concluded. Remembered interviewing Mr. Wethmar along with his father. They first asked £800, and ultimately agreed upon £700. The conversation with Mr. Wethmar occurred before Loubser arrived. When Loubser came they discussed the matter, but witness said to Mr. Wethmar, "Remember, this is not a concluded sale—simply a precaution in the event of our getting notice from Mr. Smuts."

By the Court: I am sure I said that.

Continuing, witness said plaintiff came to him on the Tuesday and asked him to conclude the sale. Witness said, "Don't be in such a hurry. We haven't seen Mr. Smuts yet." Plaintiff said the documents had been made out, and witness must sign. He afterwards went to Wethmar's office, but was not shown the resolution of the directors that afternoon. In the evening Wethmar read over the resolution consenting to the mortgage, but witness never said, "All right."

Cross-examined: He did not send for Loubser on the 17th. Distinctly told Wethmar that it was not a concluded sale. Never said anything to Loubser about consulting his mother. Plaintiff came to witness and asked him to push the sale through, but he declined.

William Johannes Vos, father of the defendant, deposed that no concluded contract of sale took place at the office of the Board of Executors on the 17th October. They were simply arranging in case Mr. Smuts sold his property. The amount to be advanced was £700.

Cross-examined: Q. Do you remember saying to Mr. Loubser, "Do not name me in this matter; you know the old lady bosses us all, and she is against the purchase"?—A. Plaintiff may have dreamt that. I never said it.

William Johannes Vos, jun., deposed that he remembered plaintiff calling on his mother. He came to see about the house. He said he did not care whether he sold the house or not. That was subsequent to the 17th October. He was present when his father and brother returned from the Board's offices, and his mother was satisfied with the arrangement they had made.

Cross-examined: Knew that his father had the option of buying Mr. Smuts's house at this time. Was certain that they did not buy plaintiff's house. They only entered into the negotiations

with the Board in case they should buy the house.

Marthinus Smuts deposed that Mr. Vos, sen., rented a house from him. There was no communication between him and the Vos's from the 11th to end of October.

Cross-examined: Mr. Vos had the refusal of buying his house, and still had the option of doing so.

Mr. Sheil was heard for the plaintiff and Mr. Juta for the defendant.

The Chief Justice said: Although by our law contracts for the sale of land are not required to be in writing, the invariable practice of this Court has been not to enforce such a contract unless proved by clear and unimpeachable evidence.

After stating the facts, his lordship continued: These facts satisfy me that on the 17th October a contract was concluded between the plaintiff and the defendant for the purchase by the latter of the land in question, subject to the condition that the Malmesbury Board of Executors, in the presence of whose secretary the contract was made, should on the following day decide to advance the purchase price upon security of certain specified properties belonging to the defendant.

The sale was therefore a conditional one, the condition being the resolution by the Board to advance the money. If the Board had refused to advance the money, the sale would have fallen through. But as soon as the decision of the Board to advance the money was communicated to the defendant, as the borrower, the condition was accomplished and the obligations of the parties to the contract, which till then had been suspended, became as binding as if there had been no condition.

According to Voet (18, 1, 24) neither party had a *locus penitentiae* in the interval.

But let us assume that the contract of sale was not concluded on the 17th October, and that the arrangement then was, that if the Board would on the following day advance the money the defendant would purchase the property.

There is much to be said for the view that in such a case the defendant would have had a *locus penitentiae*. But on the following day the Board communicated its resolution through the plaintiff to the defendant.

Upon receiving this communication the defendant said it was all right, he would come later to draw the documents required for the transfer. It was not till another day had passed before the defendant repudiated the contract, but it then certainly was too late.

Under these circumstances, I am of opinion that the plaintiff is entitled to the purchase price of the land, he tendering to give transfer in due form, and that judgment must be given in his favour with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissiné; Defendant's Attorneys, C. C. de Villiers.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. } 1892.
Justice BUCHANAN, and Mr. } Dec. 8th
Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

ZEEDERBERG AND DUNCAN V. BROWN AND ANOTHER.

Mr. Tredgold moved for the final adjudication of the defendant's estate as insolvent.
Granted.

VAN BEEK V. JACOBS.

Mr. McLachlan moved for the final adjudication of the defendant's estate.
Granted.

DE VRIES V. HERMAN.

Mr. McLachlan moved for judgment, under rule 819, for £44 4s. 9d. with interest. Defendant had been barred from pleading.
The Court granted judgment.

MALAN'S EXECUTORS V. MALAN.

Mr. Juta moved for judgment, under rule 819, for £1,056 15s. 16d. with interest.
Granted.

EDLIN AND STEVENSON V. THE SOUTH AFRICAN INTERNATIONAL EXHIBITION.

Mr. Graham moved for judgment for £71 16s. 6d. against the defendants, as represented by E. A. Judge and James Lawrence. The claim had already been paid, and they now asked for costs only.

The Court made the order for the costs.

ADMISSION.

Ex parte MARAIS.

Mr. Sheil moved for the admission of Mr. David Francois Marais as an attorney and notary.

Mr. Marais took the oaths, and was duly admitted.

ANNANDALE MILLS V. HARDER

Mr. Juta moved for an order declaring execu-

table a sum of money in the hands of the Singer Manufacturing Company for account of the respondent in respect of a judgment of the Resident Magistrate of Cape Town, which respondent failed to satisfy, and on which he had been sent to prison.

The Court declared the sum executable.

ZURING V. ZURING.

Mr. Tredgold, on behalf of plaintiff, moved for leave to sue *in forma pauperis* in an action for divorce on account of defendant's adultery.

Referred to counsel.

ESTATE OF LATE BAREND KOSSUTH.

Mr. Searle moved for leave to the surviving spouse to invest the proceeds of the joint estate in landed property, on condition that the same be mortgaged to secure the inheritance of two minors.

The Court made the order in terms of the prayer, subject to the approval of the Master

PETITION OF WM. WATT.

Mr. Sheil moved for authority to the Registrar of Deeds to cancel certain mortgage bond for £200, passed by petitioner in favour of the South African Mortgage and Investment Company on the 16th December, 1864, the said bond having been paid in full but not cancelled, and the company having ceased to carry on business.

The order was granted.

IN THE MATTER OF THE MINOR MARIA D. LINDENBERG.

Mr. Joubert moved for authority to the father and natural guardian to dispose of certain landed property at Mostert's Bay, in the division of Stellenbosch, bequeathed to the minor by her grandmother, now deceased, and with the proceeds to acquire a property at Sea Point, passing a mortgage bond thereon to secure such balance as may remain unpaid; such transaction being for the benefit of the minor.

The Court granted the necessary authority, provided that the purchase price in both cases was approved by the Master.

LE SUEUR V. LE SUEUR.

Mr. Graham moved for the appointment of a *curator ad litem* in proceedings about to be instituted to have the defendant declared of

unsound mind and unable of managing his own affairs.

The Court appointed Mr. Joubert *curator ad litem*.

MELLISH V. HOLM. { 1892.
Dec. 8th.

Spoliation—Interdict.

Mr. Searle moved to make absolute the rule *nisi* for an interdict restraining respondent from interfering with the walls and premises on a piece of ground adjoining applicant's property in Somerset-road, Cape Town, pending an action between the parties.

This was the return day of a rule *nisi* granted on 2nd December, calling on the respondent to show cause why he should not be interdicted from further interfering with a bath-room, or breaking down or injuring certain walls in so far as a certain passage adjoining applicant's property was concerned.

The applicant purchased from the trustee in the insolvent estate of one James Flaherty a certain piece of ground with buildings thereon situate in the Somerset-road, Cape Town, and received transfer thereof on 1st July, 1885.

At the time of the purchase the passage marked on the diagram annexed to Flaherty's transfer had been closed and built upon, and at the end of the passage there was a door.

Applicant had not built upon the property, but he had kept it in good order and repair.

A few days before the interdict was applied for the applicant received a letter from the respondent claiming that the former should get everything out of the way, as the latter intended to open up the said passage.

The applicant returned respondent's letter, and disputed his right to open up the passage.

On the 2nd December the respondent commenced breaking down the bath-room, into which he had already made a hole.

Upon these facts, supported by affidavit, a rule *nisi* was granted, which operated as an interdict.

It appeared from the affidavit of Flaherty, the former owner of the property, that during the time of his occupation the common passage above referred to was closed on respondent's side with the consent of the latter, to whom £15 was paid as consideration, after which he (Flaherty) built the bath-room in question.

Mr. Graham now appeared for the respondent, and read his affidavit, from which it appeared that the property adjoining applicant's was not the respondent's, but belonged to his wife, to whom he was married out of community of pro-

perty; that she being dead, her minor children were the owners, although it was still registered in his wife's name. He further alleged that the right to block up the passage and build the bath-room was purely personal to Flaherty, and that his (the respondent's) wife had been no party to the transaction. Finally he alleged that his only object at present in breaking through the wall was to lay down drainage pipes in the said passage.

Mr. Searle, in support of the rule, contended that the respondent was clearly his wife's agent; that a servitude had been created, for which the £15 paid was the consideration. In any case respondent was not entitled summarily to interfere with buildings erected with his approval and consent. The respondent was really a spoliator, and the rule should be made absolute.

Mr. Graham for the respondent.

The Chief Justice said the applicant had been for some years in peaceable occupation of a bath-room which had been built upon a passage common to the applicant and respondent's wife. He had got notice from the respondent claiming that the applicant should get everything out of the way, as respondent was going to open up the passage. In pursuance of this notice, the respondent proceeded to make a hole in the bathroom wall. Applicant was quite justified in concluding that the hole was made in pursuance of this notice, and that the intention of respondent was to break down the whole of this bathroom for the purpose of opening up the passage. Accordingly he applied for an interdict and the question was whether that interdict should be made absolute. In his lordship's opinion, it ought to be made absolute. It was not necessary to consider whether the contract relied upon by applicant was purely personal or not. Something might be said on both sides, but that point did not arise. It did not appear from the affidavits in what capacity respondent had acted—whether as executor of his late wife or not. It was quite clear that the right to send the water through the passage had been rescinded by the respondent, and had it been that applicant or his predecessor in title had done anything to prevent the water from flowing through, then respondent would have been entitled to come into court to claim that the free flow of water should not be interfered with. But this was a question of spoliation. The respondent had taken the law into his own hands. The rule would be made absolute, with costs; leaving it open to the respondent to bring an action to have his rights declared. The applicant was to retain the key of the bathroom in the meantime, but the respondent to have access to the bath-room for the purpose of laying down the drain pipes.

[Applicant's Attorney, C. C. de Villiers; Respondent's Attorney, W. E. Moore.]

DE STADLER V. MORRIS. { 1892.
Dec. 8th.

Summons — Magistrate's Court — Misdescription of defendant — Exception — Amendment—Agent's fee.

A Magistrate allowed an exception to a summons on the ground of misdescription, the defendant having been described by initials only and not by his Christian name. It was clear that the defendant was the person intended to be summoned and that he knew it.

Held, on appeal, that the Magistrate, who knew from the defendant's power to defend what his Christian name was, ought to have directed an amendment of the summons instead of allowing the exception.

In remitting the case to the Magistrate to be tried on the merits the Court directed that the fees of the plaintiff's agent for drawing the summons should not be allowed in the taxation of costs.

Van Druten v. Van der Venter (4 H.C., 52) overruled.

This was an appeal from a decision of the Resident Magistrate of Simon's Town in an action in which the appellant (plaintiff in the Court below) sued the respondent (defendant) for £20 damages.

The defendant was described in the summons as "B. C. Morris, draper, Simon's Town," instead of by his full name, "Benjamin Charles Morris."

The defendant's agent excepted to the summons on the grounds that the defendant had been misdescribed, citing in support of the exception the case of "Van Druten v. Van der Venter" (4 H.C.R., 52).

The Magistrate held that the case cited was in point, and sustained the exception with costs.

From this decision the plaintiff appealed.

Mr. Searle was heard in support of the appeal, and contended that the exception was a highly technical one, and the Magistrate should have overruled it. He referred to Act 20 of 1856, section 50, and rule 8, schedule B. Even if the summons were informal, the informality was cured by the appearance of the defendant ("Selby v. Friemond," *Cape Times*, September 6,

* In that case it was urged that the summons was bad inasmuch as the defendant was insufficiently described as M. Selby instead of her Christian name being set forth in full. The Court held, however, that that objection was cured by the defendant's appearance.—Ed.

1887). Counsel also referred to and distinguished the cases of "Rens v. Heydenrych" (1 Mens., 124), "Norden v. Hoole" (1 M., 125), "Rawstone v. Theron" (1 Ros., 144), and "Malcher & Maloomess v. Van Royen" (2 E.D.C., 155).

Mr. Juta (for the respondent): No summons in which the initials of a defendant only appeared would be allowed to issue out of the Supreme Court. The practice had always been to give the names in full. He referred to the cases above cited. The practice had been established by decisions which had never been overruled. The Court, in view of such weight of authority, would not depart from its fixed practice.

The Chief Justice said: The main object of the summons is to bring the defendant, against whom the claim is made, into court. If the Court is satisfied that the summons has been duly served upon him, and he knows that it is intended for him, a misdescription of the defendant ought not to be held fatal to the summons. The Court has ample powers of amendment, and ought not to scruple to exercise them in such a case. In the case of "Rens v. Heydenrych" (1 Mens., 124) the majority of the Court were satisfied that the person sued and served as Jan C. Heydenrych was the defendant intended to be summoned, and accordingly held that he had been sufficiently described. The Court expressed no opinion as to what its decision would have been if the defendant had excepted to the summons, but, with the powers of amendment which the Court now possesses, there can be no doubt as to what course should be adopted at the present day. The case of "Kramer v. Van Reenen" (1 Foord, 1) affords a signal illustration of the unwillingness of this Court to allow a mere technicality to override substantial justice. The applicant, Maria Kramer, had been summoned in the Magistrate's Court as "Margaret Kramer," and applied to have a writ of attachment which had been issued against her upon a judgment in default set aside on the ground of such misnomer. The Court, however, being satisfied as to her identity, as to the service of the summons upon her, and as to the knowledge that she was the person intended to be summoned, refused to set aside the writ. Not long afterwards a case was decided in the High Court of the Transvaal, "Conradie v. Dunell, Ebdens & Co." (Chief Justice Kotzé's Reports, 227), which is almost identical with the present case. I refer to that case the more readily as I conceive it to be of great importance that the law and practice of the different courts of South Africa should be essentially the same. The appellant having been sued in the Landdrost's Court as "F. W. Conradie, of the farm Modderfontein, in the district of Rustenburg," excepted that the summons did not state his full name, but the

Landdrost overruled the exception. The High Court dismissed the appeal on the ground that the appellant had not been prejudiced and his identity had been sufficiently established. The High Court of Griqualand also, in the case of "Dell v. Otto" (2 H.C., 58), followed the same rule of practice. There the defendant had been described in the summons by an initial in lieu of her second Christian name, but inasmuch as the summons also contained a full description of her husband, the Court held that there was no possibility of any mistake arising through the use of the initial, and overruled the objection taken on behalf of the defendant to the summons. The same Court, however, in the subsequent case of "Van Druten v. Van der Venter" (4 H.C., 52), did not apply the same principle to an exception taken to a summons in a Magistrate's Court. The appellant's counsel has endeavoured to distinguish that case from the present, but its essential features are the same. It was relied upon by the Court below, and there can be no doubt that if that case was properly decided, the Magistrate's judgment must be upheld. It can only be supported, if at all, because of special provisions contained in the Magistrates' Courts Acts, which require the application of different principles to summonses in the lower Courts from those applied in the superior Courts. If there is such a difference it appears to me to lie in the direction of less strictness in the inferior Courts. The English case cited in the High Court arose out of a nomination paper signed by a person with an additional Christian name to that in which he had been enrolled, and appears to me to be inapplicable to a case where the sole question ought to have been whether the defendant intended to be summoned was before the Court. If he was before the Magistrate's Court, the summons ought to have been amended by direction of the Magistrate, even if the plaintiff himself failed to apply for such an amendment.

Can there be any doubt in the present case that the person whom the plaintiff intended to sue was before the Court below, and that he knew that he was the person so intended? He is described in the summons as "B. O. Morris," but he had been so described in a writ of execution drawn by his own agent and counter-signed by the Magistrate. The illegality of the proceedings under that writ was the foundation of the present action. In the power to defend given by the defendant, he described himself as "Benjamin Charles Morris." The Magistrate, therefore, knew what the man's full name was, and ought to have directed an amendment of the summons when the exception was taken on behalf of the defendant. I quite concur in the view that laxity in practice should not be encouraged, but at the same time I am unwilling, unless there is no other

course open, to punish clients for the mistakes of their advisers. By all means let the agent in the present case be deprived of his fees for drawing the summons—this will make him and other law agents be more careful in the future—but let not the defendant, if he is liable to pay the claim, be allowed to postpone the payment by means of such technicalities. The appeal must be allowed with costs, and the case remitted to the Magistrate with a direction that the summons be amended by substituting the words "Benjamin Charles" for the initials "B.C.," and that, in the taxation of costs, the fees of the plaintiff's agent for drawing the summons be disallowed.

Mr. Justice Buchanan said that he had considerable sympathy with the Magistrate in this case, as he appeared to have followed a decision in a higher Court.

Appellant's Attorney, J. Hamilton Walker; Respondents' Attorneys, Messrs. Van Zyl & Buissiné]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. Dec. 12th.
Justice UPINGTON, K.C.M.G.]

AHLBOM V. VICKERS.

Sale of servitude—Oral contract—Right of way—Costs—Claim in reconvention.

The rule that oral contracts for the sale of land should not be enforced unless proved by clear and unimpeachable evidence equally applies to contracts for the sale of servitudes.

The owner of land, upon which there was an avenue, having granted a right of way through the avenue to the owner of one tenement, is not on that account prevented from granting a right of way through the same avenue to the owner of another tenement, unless the second servitude interfered with the proper enjoyment of the first.

Mr. Juta and Mr. Watermeyer appeared for the plaintiff, and Mr. Searle and Mr. Graham for the defendant.

This was an action instituted by Carl Eric Ahlbom against Albert Edward Vickers, for the sum of £50.

The declaration alleged that the parties reside

at Sea Point, and that an avenue is situated upon the plaintiff's land adjoining the defendant's land.

That on or about 22nd October, 1891, and in Cape Town, the parties agreed that in consideration of defendant paying the plaintiff the sum of £50, the latter would sell and grant to the former and his successors in title a right of way over the said avenue from the defendant's ground, and would execute a notarial deed for registration in the Deeds Office to the effect that the defendant and all subsequent proprietors of the defendant's land should have the said right of way over the said avenue, and it was at the same time agreed that the points of egress from the defendant's land on to the said avenue should be arranged between the parties upon the ground itself.

That the plaintiff has always been ready and willing, and has offered and tendered to perform his part of the said contract, but the defendant refuses to pay the £50, or to meet the plaintiff to arrange upon the points of egress.

The plaintiff claimed :

(a) The sum of £50 with interest *a tempore moras*, he again tendering and offering to perform his part of the said contract.

(b) Alternative relief.

(c) Costs of suit.

The defendant admitted the formal allegations contained in the declaration and pleaded, *inter alia* :

That on the 22nd October, 1891, he already possessed a right of way over the said avenue, and he referred for greater particularity to the allegations set forth in his claim in reconvention.

He admitted that he refused to pay the sum of £50 for the said right of way ; he denied the other allegations contained in paragraph 8 of the declaration, and prayed that the plaintiff's claim might be dismissed with costs.

For a claim in reconvention the defendant (now plaintiff) said :

1. In or about March, 1891, he purchased from the plaintiff (now defendant in reconvention) a certain piece of ground situate at Sea Point for the sum of £800, and it was agreed to between the parties that the access from the said piece of ground to the high-level road at Sea Point should be by a road marked "private road" upon the diagram (the said road is referred to as an avenue in the declaration). The defendant in reconvention further undertook to put the said road in a proper state of repair, and to register upon the title deed of his property, immediately above and adjoining that sold, a servitude of grazing rights for cows, and of a run for poultry, in favour of plaintiff in reconvention.

In consideration of the above undertaking, the plaintiff in reconvention undertook to pay a further sum of £50.

2. The defendant in reconvention failed and neglected to put the said road into proper repair, or to have the said servitude registered, although the plaintiff in reconvention has always been ready and willing to pay the said sum of £50.

3. On or about June 3, 1891, the plaintiff in reconvention bought from the defendant in reconvention a certain other lot of ground adjoining the piece above referred to, for the sum of £825, and it was a term of the agreement of purchase and sale that no other person save the plaintiff and defendant should have access along the private road above referred to.

4. Thereafter, and before the commencement of this suit, the defendant in reconvention sold a right of way over the said road to one Stephenson, an adjoining proprietor, for the sum of £25, in breach of the agreement in the last paragraph set forth.

5. By reason of the said breach the plaintiff in reconvention has sustained damages in the sum of £50.

The plaintiff in reconvention claims :

(a) That the defendant in reconvention be ordered to complete his said contract in paragraph 1, set forth by putting the said road in repair and registering the said servitude, the plaintiff in reconvention tendering £50.

(b) That the defendant in reconvention be ordered to pay the sum of £150 as damages for breach of contract, as in paragraph 5 set forth.

(c) Such alternate relief as may seem fit.

(d) Costs of suite.

The replication was general, and for a plea in reconvention the plaintiff said, *inter alia* :

That in or about the month of March, 1891, the plaintiff in reconvention bought certain land from the defendant in reconvention for the sum of £850, but that through an error the figures £800 were inserted in the documents relating to the sale. The right of way referred to was a right of way merely personal to the plaintiff. That thereafter, upon the plaintiff discovering the said error, he took certain legal steps to compel the plaintiff to pay the additional sum of £50.

That thereafter the plaintiff refused to pay the said sum, and set up certain claims which the defendant denied, and thereupon the plaintiff violently assaulted the defendant. Whereupon the defendant commenced proceedings, both civil and criminal, against the plaintiff for the said assault ; and thereafter, in the month of October, 1891, the parties met at the office of the attorney and notary D. F. Berrangé, where they agreed to settle all disputes and claims between them ; and thereupon, and at the said office, the said parties, as a settlement and withdrawal of all disputes and claims between them, entered into the agreement set out in the declaration.

The plaintiff seeks to set up claims set up by

him before the said mutual withdrawal and settlement of all claims on either side.

Save as aforesaid, the defendant in reconvention denies all the allegations in the said claim in reconvention contained, and prays that the plaintiff's claim may be dismissed with costs.

The rejoinder and replication in reconvention were general, and on these pleadings issue was joined

Carl Eric Ahlbom, plaintiff, deposed: I reside at Sea Point, where I have certain property. In March, 1891, I sold defendant certain ground (plan produced)—two lots, one for £800 and one for £50. The transfer did not take place till September. In June, 1891, I sold him another piece of ground for £825, and in disposing of this piece of ground I made the reservation in the contract that the avenue adjoining was to be left as it stood—no trees to be cut down—and the path to remain a private road for Mr. Vickers and myself. On September 28 I discovered that Mr. Vickers had got transfer for the piece of ground at the purchase price of £800 instead of £850. I afterwards met defendant and told him I wanted an acknowledgment for £50, which was the balance due. He said, "I won't give you that," but he promised to give me the amount in two instalments of £25. I communicated with my attorney, who wrote to Vickers, but Vickers did not take any notice, and in October I received a letter from his attorney, stating that if I attempted to sell the right of way through the private road adjoining the property before mentioned, he would be obliged to take out an interdict against me. On the evening of 20th October I saw Vickers standing at the corner of Waterkaant-street, and as I was going to catch the tramcar I did not take any notice of him. He followed me up to the car and abused me and hit me on the back with his stick. He went to Sea Point on the same car, and followed me up the avenue. He was flourishing a stick; I took it from him and threw it over the wall. Then I fell, and Vickers got on top of me and hit me several severe blows. Mr. Stephenson interfered, and defendant went away. After this I again communicated with my attorney, Mr. Berrangé, and some time after I met Mr. Vickers at the attorney's offices. Defendant then offered to pay the £50 if I would give him a right of way up to the mountain. He also asked that no gate should be placed opposite his house. He promised to pay in three bills of three, six, and nine months, and I promised not to have the bills discounted. I was to have the right to transfer to Mr. Stephenson 150 feet of the avenue.

Cross-examined by Mr. Searle: Mr. Maskew was my surveyor, and he surveyed the land in one lot. When the first lot was sold in January nothing was said about the avenue. My attorney drew up

all the documents. Bills were received extending over five years, from 1891 to 1896 inclusive. Mr. Vickers said nothing about the right of grazing on the mountain ground. When I saw the diagram I knew that the price was £800. I did not write to defendant till six months after. When I sold the right of way to Mr. Stephenson, defendant was very angry. He insulted me in the street. I never struck him; he attacked me

By the Court: There was no writing about the first sale. The meeting in Mr. Berrangé's offices was for the settlement of all disputes. Witness's attorney knew that he had sold the right to Stephenson.

Daniel Frederick Berrangé, attorney of the Supreme Court, deposed that he knew both parties to the suit. He wrote the letter of 24th September; he afterwards saw Mr. Vickers, who said the one lot was sold for £250 and the other for £50, making £800 in all. Nothing was said about the avenue and nothing about the grazing rights. Heard nothing about that claim until October. Mr. Vickers called at his office with the view of having the dispute settled. Plaintiff and defendant shook hands and were friends. They agreed to throw up all actions and claims up to that day. Defendant agreed to pay £50 in consideration of a servitude, giving him (Vickers) and his successors in title right to the avenue. Mr. Ahlbom explained that he was going to fence in the avenue and Vickers said, "Well, if you do that you might put the fence right in front of my property." As regarded the gate, they were to meet on the ground and arrange about it. Bills were arranged at three, six, and nine months. Witness tried to make peace between them as a friend.

Cross-examined: Witness did not draw up any deed, because the question of the gates had to be decided. He drew up the declaration of seller.

By the Chief Justice: Did you consider that part of the consideration for that £50 was the registration of the servitude alongside the property previously bought by defendant?—A. I took it to be this—that it was only a personal servitude; the avenue went as far as the property went; and if defendant sold the property, then the personal servitude would lapse.

For the defence,

Albert Edward Vickers, defendant, teller in the Standard Bank, deposed that he bought a piece of ground from plaintiff in January. He had two transactions in that month; £250 was the price. The £50 in question he had to get consideration for in the shape of grazing rights, and the avenue was to be kept in good repair. That was distinctly understood between the parties. Witness had been very anxious to secure the privacy of his house and grounds, and bought the smaller bit of ground with that

object. On several occasions he asked plaintiff to put the avenue in repair. Nothing was done.—Q. Do I understand you to say that you bought the ground for £250, and that another agreement was entered into, under which, for the sum of £50, you obtained grazing rights behind the house and the right to the avenue?—A. Precisely. Within a fortnight he bought the other lot for £50. He was very much surprised that plaintiff had sold a right of way to Mr. Stephenson. He was actually sick on the spot. As regarded the fight, plaintiff struck witness first when he was going on to the car. On reaching Sea Point, plaintiff got off at defendant's road and said to him, "What have you to say?" Witness called him a scoundrel, plaintiff thereupon wrenched the stick out of his hand, and witness afterwards thrashed him. He remembered the meeting in Mr. Berrangé's office. After shaking hands Mr. Berrangé told witness that he had no right of way to the avenue. Witness was anxious to have it, and offered £50 for the right. Nothing was definitely settled. He was still willing to pay £50 for the right of grazing if the avenue should be put in repair. That was the original agreement.

Cross-examined: There was nothing said about the cause of the quarrel at the meeting in Mr. Berrangé's office. The building was finished in July, and witness took possession of the house on the 18th August.

By the Court: The right of way was valued at £150, and that was the amount of damage which defendant had sustained through Stephenson having obtained access to the avenue.

Stephen M. Christie, broker, Cape Town, deposed that he was employed by defendant to purchase the lower of the two lots. The document put in was drawn up by witness. A clause was inserted with regard to the exclusive right to the avenue. Regarding the meeting in Berrangé's office, both plaintiff and defendant had the appearance of being knocked about. Mr. Berrangé told defendant he had no right of way, and Vickers said he would like to have one, and agreed to pay £50 on certain conditions. It was mentioned that Mr. Stephenson had only access to a portion of the avenue. No definite contract was arranged, though it was distinctly understood that they were going to meet on the ground with regard to the gates.

Cross-examined: Witness went to the meeting in Berrangé's office to see the friendship made up. The arrangement that was arrived at, as far as he understood, was that Vickers was to give Ahlbom £50 for the right of way, which was to be registered against Ahlbom's title, and was to be for the benefit of Vickers and his successors in title. There were some minor things to be settled, but witness left, because they seemed to be getting on so well.

By the Court: There was nothing said about a claim for damages for Stephenson getting a right of way over the ground. The claims were waived on both sides, so far as he heard. Something was said about the repair of the avenue.

Mr. P. K. Maskew, land surveyor, deposed that he was well acquainted with the property in dispute. He framed the diagram of the first lot sold before the 28th March. He never heard about making two lots of the ground. The diagram was shown to Mr. Berrangé.

Cross-examined: He might have received instructions separately, but heard nothing about dividing up the land into two portions.

Counsel on both sides having been heard, the Court delivered judgment.

The Chief Justice said: The Court had occasion in the recent case of "*Louber v. Vos*" (*ante* p.) to observe upon the necessity of producing the clearest evidence in support of oral contracts for the sale of land.

The observations then made equally apply to sales of servitudes upon land. The plaintiff claims £50 as the purchase price of a right of road alleged to have been sold by him to the defendant on the 22nd October, 1891. The sale is said to have been concluded in the office of Mr. Berrangé, the attorney, but there is no satisfactory explanation why it was not there and then reduced to writing.

The plaintiff may have understood that there was a final contract, but the defendant did not so understand it.

The declaration itself admits that arrangements had still to be made as to egress from the avenue, through which the defendant was to have a right of road, and the evidence of Mr. Christie shows that the extent of the avenue was still to be determined.

In the absence of satisfactory proof of the sale, there must be absolution from the instance upon the claim in convention.

As to the first claim in reconvention, whereby the defendant claims a servitude of grazing upon a portion of the plaintiff's land by virtue of an alleged purchase, the evidence of such purchase is as unsatisfactory as that upon which the plaintiff relied in his claim.

By his second claim in reconvention the defendant asks for damages which he says he has sustained by reason of the plaintiff having given a right of way to one Stephenson through the same avenue through which the defendant claims to have acquired a private right of way. This private right of way has not been registered upon the title deeds of the servient tenement, but I will assume that it has been duly acquired.

It does not follow that the plaintiff, after giving the right of way over his own property to the owner of one tenement, was debarred from conferring a similar right on the owner of

another tenement. A servitude constitutes no greater limitation upon the rights of the owner of the servient tenement than is required for the due and proper enjoyment of the servitude by the owner of the dominant tenement. No subsequent servitude which interferes with such enjoyment can be created, but subject to this limitation the owner of the servient tenement is entitled to impose as many servitudes as he pleases upon his own land. In support of this view, I need only refer to Voet (8, 4, 16), and the passages from the Digest cited by him. In the absence in the present case of any stipulation prohibiting any subsequent servitude, or of any proof that such subsequent servitude would interfere with the defendant's free enjoyment of his right of way, I am of opinion that the defendant must fail upon his second claim in reconvention.

As to costs, it is clear that the defendant only brought forward his claims in consequence of the action brought against him, the proper course will be to order the plaintiff to pay all costs, except such additional costs as have been incurred by reason of the claims in reconvention, which must be paid by the defendant.

[Plaintiff's Attorney, J. C. Berrangé; Defendant's Attorney, C. C. de Villiers.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] { 1892.
Dec. 18th.

LE SUEUR V. LE SUEUR
De lunatico inquirendo.

Mr. Graham appeared for the plaintiff and Mr. Joubert as *curator ad litem* for the defendant.

This was an action to have Mr F. le Sueur declared incapable of managing his person and property, and for the appointment of curators.

Mr. Johannes le Sueur deposed that the defendant was his brother. He was twenty-nine years of age. In his youth he was fairly strong, but suffered from epileptic fits later in life. After leaving school he went into the office, but was only useful for messages, &c. Witness had never seen him read a book. He had been in the business up to July. In October, 1891, witness left Cape Town and returned recently. He noticed a change in his brother's conduct. It was a change for the worse. He had been spending money very recklessly. He had run up accounts at various

houses and signed a bill for £556. Witness could not get any lucid explanation of his transactions from his brother. Defendant was never allowed to be alone—he was always under watch—and was incapable of looking after his own affairs. Witness wished his mother made curator of his brother's person, and Mr. Gibson, secretary of the South African Association, curator of his property.

By Mr. Joubert: Witness only wished defendant declared incapable of looking after his person and property. He did not wish him declared of unsound mind.

Leah Stevens, nurse in the family, said she had known Master Frank since he was three months old. He first had a fit when he was ten years old. He sometimes wandered away from the house, and once threatened to drown himself. He had a fit on Monday night. One evening he wanted to bite her.

Dr. Pearson, Sea Point, who had attended Mr. F. le Sueur, deposed that it would be better for himself if he had someone to look after his person and property. People who suffered from epileptic fits very often became insane.

Cross-examined: Excessive worry would aggravate the case. There was an abnormal formation on the head.

Dr. Baird, Cape Town, would not say that the defendant was of unsound mind. He might get all right if the cause of the worry were removed.

By the Court: He was of unsound mind with lucid intervals. He would not be fit to look after his property in these lucid intervals. The tendency with persons who suffered from epilepsy was to become worse.

Mr. Joubert submitted that as the medical witnesses appeared to doubt that the defendant was of unsound mind, the Court should make an order similar to that made in "*Shawe v. Honeybourne*" (1 C.T.L.R., 296), but that the evidence was not sufficient to justify the Court in declaring the defendant of unsound mind.

The Chief Justice said the Court was quite satisfied that the defendant was not of sound mind, and consequently they were justified in declaring him of unsound mind. The Court would therefore declare the defendant to be of unsound mind, and would appoint his mother curator of his person, and the secretary for the time being of the South African Association curator of his property. Of course it would always be competent for the defendant when he regained his soundness of mind to apply to the Court to be discharged from curatorship.

[Plaintiff's Attorney, C. C. Silberbauer.]

MCLAREN V. MCLAREN. { 1892.
Dec. 18th.

This was an action for divorce at the instance of

Charlotte Johanna McLaren against her husband, John McLaren, on the ground of adultery.

Mr. Watermeyer for plaintiff; defendant in default.

Charlotte Johanna McLaren, plaintiff, deposed that she was married on 8rd August, 1886. After the marriage she and defendant went from Cape Town to Ceres, her husband going to manage Mr. Ohlsson's farm. One child, a boy, was born of the marriage. She lived there until 1888, when defendant commenced to drink and ill-treated her. He threatened to shoot her. She had to leave the house and drive to Ceres. She took her child with her. She afterwards went to Port Elizabeth, and since that time had supported herself. Defendant wrote her one letter, saying he wanted a divorce, as he had someone else to look after him. He was now in Beaufort West.

Sergeant William Wood, of the Cape Mounted Police, had occasion to sleep at the farm near Ceres on which defendant was living. He had seen the defendant in the same bedroom with another woman. McLaren left the Ceres district in May, 1890, and went to Beaufort, where he kept a dairy farm.

The Court granted decree of divorce, 'with forfeiture of all the benefits derived from the community; plaintiff to have the custody of the child, defendant to pay for the maintenance of the child at the rate of £1 per month, from 1st January, 1893, until the child attains the age of sixteen. Costs were also allowed.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret.]

In re BICCARD V. BICCARD AND FRYER.

Mr. Juta appeared for the applicant; the respondent did not appear, either personally or by counsel.

Mr. Juta moved in this matter upon a notice which had been served personally upon respondent calling upon her to show cause why the applicant should not have the custody of the youngest child of the marriage now in her custody. Copies of affidavits had been served upon respondent, and these affidavits were read to the Court. They alleged that the respondent and Dr. Fryer had passed the night of the 7th December in a hotel at Kalk Bay as Mr. and Mrs. Forbes. Counsel submitted that respondent had thereby forfeited her right to the custody of the child.

The Chief Justice said in making the order on the last occasion the Court reserved the right to either party to apply again with reference to the custody of the children. The Court gave the custody of the youngest child to the mother because it was the youngest, and because the mother herself seemed very anxious to retain

its custody. Circumstances had changed since, and as she did not appear to take the trouble to come into court or to be represented by counsel, he must therefore assume that she no longer wished to keep the custody of this child. Under the circumstances disclosed in the affidavits, he could well understand that the father would object to the child living with the mother if she continued to cohabit with Dr. Fryer. The Court therefore made the order that the plaintiff was to have the custody of the youngest child also.

[Applicant's Attorney, P. M. Brink.]

REGINA V. PIETERSEN AND { 1892.
OTHERS. { Dec. 18th.

Assault—Act 27 of 1882, section 10—Conviction—Appeal.

This was an appeal from a sentence passed upon the appellants by the Resident Magistrate of Worcester.

The accused (three cabdrivers) were charged:

1. With the crime of assault, in that they all, or each, or one or other of them did, on or about the 19th October, 1892, and at Worcester Railway-station, Worcester, wrongfully, unlawfully, and violently strike one Goliath with the fist and throw one Klaas to the ground, and other wrongs and injuries they all, or each, or one or the other of them to the said Goliath and Klaas then and there did.

2. That the said Pietersen and the others are guilty of contravening section 10, Act 27 of 1892, in that they all, or each, or one or other of them did, on or about the 19th October, 1892, and at the railway-station, Worcester, wrongfully and unlawfully make use of abusive, insulting, and threatening language towards one Daniel Maritz, tending thereby to provoke a breach of the peace.

The prisoners pleaded not guilty. They were found guilty, and the first two sentenced to pay a fine of 30s, or a month's imprisonment with hard labour, and the third to pay a fine of £2, or six weeks' imprisonment with hard labour.

The attorney for the prisoners objected to the summons as being bad, on the ground of the duplicity and misjoinder of crimes, and further, that the language alleged to have been used should have been set forth in the summons.

The Court overruled these objections, and ruled that the charge-sheet should be made out in respect of the offence under section 10 of Act 27 of 1882, according to the Act, by inserting the words "and behaviour."

The evidence of Daniel Maritz, the master of the two boys who were assaulted, went to show

that the assault took place after an ineffectual attempt on the part of the appellants to secure a passenger's luggage who had arrived at Worcester by train on the evening in question, but that he did not see Pietersen assault either of his boys, but that he came up to witness and said, "We shall strike you to-night." The evidence as to the threatening and abusive language was clear.

Mr. Graham was heard in support of the appeal, and contended that there was no evidence to justify a conviction, as far at least as Pietersen was concerned. He cited "The Queen v. Brooks" (Juta, 819).

Mr. Joubert, for the Crown, was not called upon. The Chief Justice said if the three prisoners acted in concert, then it was not necessary to prove that every one of them had actually struck a blow in order to find them all guilty of assault. There was ample evidence that these three persons were in concert. First of all, the three together took hold of a portmanteau belonging to the passenger, and then two of them struck Goliath and Klaas, the third man, who appealed, being present and not objecting. Again, Pietersen evidently had control of the other two prisoners, and was clearly acting in concert with them. No evidence was given to disprove that Pietersen was acting in concert with the two other prisoners, and the Magistrate was quite justified in finding Pietersen also guilty of assault. As to the second charge, it seemed to be wholly distinct from the first, namely, that of using abusive language and threats towards Maritz. On that point there was also clear evidence that Pietersen was the man who used the threatening language, which was quite a separate offence from the assault, and the Magistrate was right in his decision and the appeal must be dismissed.

[Appellants' Attorney, O. C. Silberbauer.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 1892.
K.C.M.G. (Chief Justice). Mr. { Dec. 14th
Justice BUCHANAN, and Mr. { and 15th.
Justice UPINGTON, K.C.M.G.]

HIPPERT'S EXECUTOR V. GERTENBACH'S
EXECUTOR.

Executor—Maladministration—Account.

Mr. Juta and Mr. Searle appeared for the plaintiff, and Mr. Rose-Innes, Q.C. (Attorney-General), and Mr. Joubert for the defendant.

This was an action to compel the filing of an account instituted by Mr. Richard Shaw Smith, of Port Elizabeth (suing in his capacity as executor testamentary in the estate of the late George Hippert), against Mr. George Frederiek Ferreira, of Elandsfontein, in the division of Uniondale (in his capacity as executor dative of the late Johan Frederiek Gertenbach). The declaration alleged that the plaintiff was appointed executor on the 11th February, 1889, and the defendant executor in Gertenbach's estate on 26th April, 1890.

That in September, 1890, the plaintiff filed with the defendant as Gertenbach's executor a claim for £477 19s. 1d. due to the estate of the late Hippert. That the defendant had filed no account in the estate of the late Gertenbach, and that the plaintiff's claim was still unsatisfied.

The plaintiff claimed :

(a) That the defendant be ordered forthwith to file with the Master a full and true account of his administration of Gertenbach's estate, and that he be ordered to debate the said account and to pay to the plaintiff such sum as may be found to be due upon such debate.

(b) That the defendant be ordered to pay interest upon such amount as may be found to be due, and which he has failed to distribute within a reasonable time after the receipt thereof, together with costs *de bonis propriis*, or alternately, the plaintiff claimed that the defendant be ordered to pay to the plaintiff the sum of £500 with costs *de bonis propriis*.

The defendant in his plea alleged, *inter alia* :

That by his last will and testament, dated 27th August, 1874, the testator made, *inter alia*, the following provisions : " I give, devise, and bequeath to my daughter (Sophia Gertenbach) a sum of £1,000, to be paid to her on her attaining the age of eighteen years, and if at my death my said daughter shall be under the age of eighteen years, then I direct that the said sum of £1,000 shall be invested on the best security, and the interest thereof shall be paid to my wife (Maria Sophia Gertenbach) until my said daughter shall attain the age above specified."

The testator's wife, who survived him, was by his will appointed, and took out letters of administration on 8th January, 1879, as his executrix testamentary.

Sophia was at the date of her father's death under the age of eighteen years.

George Hippert, whose estate is represented by the plaintiff, was a son of Mrs. Gertenbach by a former marriage, and on the 22nd February, 1873, she gave a general power of attorney to him empowering him to act in and about the administration of the testator's estate, and the said Hippert acted accordingly during the remainder of the lifetime of the executrix testamentary as such

agent, the said executrix being infirm in body and mind.

On 2nd May, 1879, transfer was passed to the said George Hippert under and by virtue of the said power of attorney of a certain property in the testator's estate, known as the Red House, which transfer was made pursuant to an agreement of sale of the said property to him by the executrix for the price or sum of £2,000 sterling.

The said price or sum so due from the said Hippert to the executrix was never paid or accounted for, and a further sum of £260, being the prices of other property in the testator's estate received by the said Hippert as agent for the executrix, was in like manner never paid or accounted for.

No inventory or account of the said estate was filed by the executrix during her lifetime, and she died on the 16th March, 1882.

No investment of the sum of £1,000 above referred to was made by the executrix or her agent, the said Hippert, during her lifetime, in accordance with the directions in the said will above referred to.

At no time did the said Hippert file, as by law required, any inventory or account of his mother's estate, but he from time to time filed certain accounts with the Master, the first of which is dated 28th August, 1883, the earliest item in which is dated 1st April, 1881, but neither in this nor in any account are the amounts of £2,000 and £260 aforesaid brought up or accounted for as by law required. There were several other allegations in the plea, and finally the defendant claimed in reconvention judgment:

(a) For the sum of £2,000, being the amount of the purchase price of the property known as the "Red House."

(b) For the sum of £260, being the amount of the prices of the other landed property sold as aforesaid by the said Hippert.

(c) For the sum of £1,000 in compensation for damages sustained by the estate of Gertenbach, by reason of maladministration by the said Hippert as aforesaid, or that he might have such further or other relief in the premises as to this Honourable Court might seem meet, together with costs of suit.

A replication, plea in reconvention, and rejoinder were filed, and on these pleadings issue was joined.

Richard Shaw Smith, plaintiff, deposed that he was appointed executor testamentary in Hippert's estate in February, 1889. Witness was secretary of the *Megia Assurance and Trust Company*, Port Elizabeth, and had had twenty years' experience of winding up estates. Hippert was the son of Mrs. Gertenbach by a former marriage. He had gone through all the papers in connection with Hippert's estate. When Hippert became executor in Gertenbach's estate there were two properties,

one in Queen-street and one in Palmerston-street, Port Elizabeth. Witness had examined the accounts filed by Mr. Hippert. From these accounts it appeared that there was a balance of £477 19s. 1d. due to Hippert. The accounts showed that he disbursed sums amounting to £998; he received rents for £516; no credit had been given for £42, which had been omitted, leaving a balance due of £485 8s. 1d. Upon defendant being appointed executor, witness filed a claim.

Cross-examined by the Attorney-General: Hippert did not keep books. His affairs were in the utmost confusion. There was nothing in Mrs. Gertenbach's estate to show that she left anything; so that if she received £2,000 she must have spent it all. Hippert paid the bond of £2,000 on May 8, 1879, over the Red House. He also undertook to pay £5 per month until the minor Sophia was of age. Hippert was a speculator, and speculated in land, shares, and produce. He kept a bank-book. When Mr. Hippert went to England after his mother's death he destroyed a number of papers.

By the Court: Can you trace any indirect payment to Mrs. Gertenbach of £1,500?—A. It is impossible to do so, because the bank-book was lost. Hippert built a house in Port Elizabeth in 1881.

Re-examined: This house was let and the rents were credited to Mrs. Gertenbach's estate. While Hippert kept no regular set of books, witness found a complete record of his administration of the estate.

By the Court: Witness was executor dative, acting for the heirs of George Hippert. No claim was made against him until this action was raised.

Mr. Juta put in the wills of Mr. and Mrs. Gertenbach, the vouchers passed by the Master, and the correspondence.

For the defence, the Attorney-General put in the certified copies of deeds of transfer of the Red House to Hippert in favour of Holland by Mrs. Gertenbach, a transfer in favour of Alexander Matthews passed on the 2nd April, 1880, by George Hippert; another in favour of Harris passed in June, 1879, granted by George Hippert. He also put in a copy of the application made by Hippert to the Court in 1882.

George Frederick Ferreira deposed that he was a farmer, residing in the Uniondale district. He married Miss Hippert, daughter of Mrs. Gertenbach by a former marriage. He was appointed executor in 1890. Found that there were only two properties left in the estate: those in Queen-street and Palmerston-street, Port Elizabeth which were sold in July, 1890, and realised £565. Then he discovered that the minor Sophia, who was now eighteen, had not been paid. He caused inquiries to be made through the Master. A claim of £247 was filed by Hippert's executors.

Mrs. Gertenbach, before her death, was a weak woman and acted like a child. She put her affairs in the hands of Mr. Hippert. As regarded the Red House, Hippert told witness that he had bought the house from his mother for £2,000. He had an account against his mother for £900, and he told witness he was going to send in that account. Hippert had been working in Gertenbach's shop.

Cross-examined: Married Miss Hippert twenty-four years ago. His wife, under the will, was one of the heirs. From Mrs. Gertenbach's death up to the time of this action he had not made any claim against Hippert. He did not know of Mrs. Gertenbach selling any other properties save that of the Red House. Witness advertised the property for sale in July, 1890, and withdrew it.

Re-examined: Withdrew the sale because he could not be there, and he wished to be present.

By the Court: Sophia was the only child of Mr. and Mrs. Gertenbach. Never spoke to Hippert about the £2,000. Never had any conversation about the purchase price. Hippert was a man of means.

Mrs. Ferreira, wife of the previous witness and sister of the late George Hippert, deposed that her mother, who died in 1882, was 51 or 52 years of age. At the date of her father's death her mother was very weak. She had paralytic strokes, and could not manage her own affairs. Her brother George managed for her. He carried through the affair as to the Red House. (Correspondence of George Hippert handed in.) On the 18th or 19th May, 1888, George remarked to her that he did not mean to let Sophia inherit anything. Witness said, "For shame! George, you have little ones of your own, and you don't know what may become of them." Witness knew that George hated the girl.

Cross-examined: He used to give Sophia £5 a month.

Wm. Armstrong, auctioneer, Port Elizabeth, gave evidence as to the value of property in that town prior to and subsequent to 1888. He valued the Queen-street property at £1,100. Prices fell very much after that date. Witness valued the property in Palmerston-street at £400 or £500, and it realised £825. He valued the property in Queen-street at £800 or £400, and it realised £240. It invariably damaged property to advertise it and withdraw it.

Frederick Monaghan deposed that he was married to Mrs. Gertenbach's youngest daughter. Remembered the Red House being transferred to Hippert. His mother denied having sold it in his presence. Hippert acknowledged that he had transferred the property to himself at the purchase price of £2,000; that he would allow his mother £5 a month out of his own pocket until Sophia reached the age of eighteen, and if she survived

the age of eighteen he would increase it to £10 a month. Witness advised Mrs. Gertenbach to have that acknowledgment put in writing.

Cross-examined: Knew that there was an agreement of sale between Mrs. Gertenbach and Hippert as to the Red House. Knew that after severe persuasion she had agreed to sell it. Witness had signed the deed of agreement. While Mrs. Gertenbach lived with witness, Hippert paid him £5 a month and then reduced it to £4, and finally sent a cheque for £20, which was the last money received. After Mrs. Gertenbach's death, witness's wife, Mrs. Monaghan, became the guardian of Sophia, and Hippert paid for her maintenance.

By the Court: In May, 1879, Mrs. Gertenbach was staying with witness. He was positive that she never received any such sum as £1,600. Mr. Hippert kept her accounts, and everything was done in his name.

This closed the case for the defence.

Durban Dyason, called for the plaintiff, deposed that he knew Mr. Hippert and Mrs. Gertenbach. Early in 1878 witness was instructed to make a demand upon Mrs. Gertenbach for arrears of salary for £700 or £900. Subsequently Mr. Gertenbach came to his office, and proceedings were in consequence stayed. In 1879 she again came to the office with Hippert, when the deed of sale was drawn up in her presence. She was certainly not a strong woman, but she was perfectly clear as to the business then transacted. Witness was of opinion that this claim of £900 was taken as part of the purchase money. Witness was quite convinced that no undue advantage was taken of Mrs. Gertenbach. After Mrs. Gertenbach's death no claim was advanced. Mrs. Gertenbach was not by any means weakminded. She instructed witness to institute an action for separation against her husband.

Cross-examined by the Attorney-General: Did not know that the Red House had already been transferred to Hippert at the date of drawing up the deed of sale.

By the Court: The payment of £5 per month was also a consideration for the purchase.

Mr. Smith, in answer to the Chief Justice, said that the net assets in Hippert's estate amounted to the value of £1,600.

John A. Rigg, land and estate agent, Port Elizabeth, was well acquainted with the properties in Queen-street and Palmerston-street, which in 1882 would not have fetched more than £1,000 at the outside. Property was now fairly high. July, 1890, was not a good time to sell. These properties in 1882 were a very good investment.

Mr. Smith, recalled, in answer to Mr. Juta, said he knew the properties in 1882. Their value at that time would not be more than £1,000. Speaking as the secretary of his company, he would con-

sider it would have been a better investment to have kept that property instead of selling it. There was a bond of £400 upon it, and a claim of Hippert's for £200. It was bringing in £120 a year, out of which Hippert was to receive £50 for five years. Witness's opinion was that Mr. Armstrong's valuation was slightly "out." He considered that the properties had been sacrificed.

Mr. Juts, having put in the account of law expenses, addressed the Court at considerable length for the plaintiff.

The Attorney-General having been heard on the items of the accounts and on the question of maladministration, the Court delivered judgment. The Chief Justice said the first question was the amount plaintiff was entitled to in his capacity as executor against the estate of Mr. Gertenbach. For the purpose of showing what the plaintiff was entitled to the accounts filed by the late George Hippert had been put in. Those accounts were not disputed; it was not denied that those accounts alleged to have been made were actually made by the late George Hippert, and the only question now was which items of that account were fairly charged against the estate. His lordship had already intimated that any payments made or appearing on the face of the account as having been made by Hippert on account of the widow Gertenbach personally could not be charged as against the estate of the late Mr. Gertenbach. Such items, for example, as the funeral expenses of the late Mrs. Gertenbach could not be charged against the estate of her husband, who died three years before her. Besides the £10 15s. for funeral expenses, there were the items £17 7s. 3d., £9 8s., and £14 7s. 2d. With regard to this last item, it was a charge which ought not to be allowed against the estate of Mr. Gertenbach. The executor ought to have followed the terms of the will, and not attempted to mislead the Court by the application which he made, for the will clearly indicated his duty, which was that the £1,000 was to be invested for the benefit of the minor, and he had no business whatever to apply to the Court as he did. His application was refused, and the executor of George Hippert ought to be called upon to pay the expenses attending that application, and amounting to £14 17s. 2d. The claim in reconvention was reduced by £51 15s. 6d., leaving £388 16s. 8d., for which judgment must be given for the plaintiff. The account put in by the plaintiff himself furnished a basis for the Court to proceed upon. In the first account the unsold property was valued, after deducting the bond, at £1,100, the bond being £200. From time to time there was a fall in the value of the property, and the last account showed that after deducting the bond of £200 the property was worth £600, and the property as sold realised £665, or deducting the bond,

£865. The law with regard to the duty of executors had been laid down in the case of "Hiddings v. South African Association." There was some difference as to the application of the law, but the Privy Council fully upheld the decision of this Court. It was there stated that in the opinion of the Legislature six months was not as a general rule an unreasonable time to allow executors to realise, and under certain circumstances twelve months or more might be perfectly reasonable. Where loss had occurred through the failure of an executor to realise within six months of the acceptance of his trust, the onus would lie upon him of proving that he acted *bona fide* and exercised a reasonable discretion. Now, in the present case, the will clearly directed what the executor was to do. The will gave and bequeathed to the daughter, Sophia Gertenbach, £1,000 to be paid when she attained the age of eighteen, and if at her father's death she was under the age of eighteen, then he directed that the sum of £1,000 should be invested in the best security, and the interest thereon should be paid to Mrs. Gertenbach until Sophia had attained the age of eighteen. Clearly the executor's duty was to realise sufficient property to acquire £1,000, and invest that amount on the best security, and in that way secure it to the daughter. It was the clear duty of the executor to realise the estate within a certain time, and if he did not realise the onus lay upon him to show that he acted for the best. In the present case the onus lay upon the defendant, and in his lordship's opinion it had not been proved to his satisfaction that the course adopted by the executor in keeping the estate open for a series of years was the best course under the circumstances that could have been followed. His own account showed that if he had sold within a year the property would have realised £1,850—ultimately the property realised £365. They would take £388, as it appeared on the account, and deducting that from £1,150 left £767, and for that amount, at all events, the defendant was entitled to the judgment of the Court. His lordship's only difficulty in this case had been with regard to the further claim for maladministration in respect of the £2,000 and the £260. As to the £260 received by Hippert during Mrs. Gertenbach's lifetime—or said to have been received, for it had not been clearly traced into his hands—they must bear in mind that they had to deal with persons who were dead, and if they had been before the Court they might have explained their transactions. Moreover, the heirs themselves ought to have objected at the time; but they didn't. They lay by and allowed Hippert to proceed with the management of the estate as he thought proper. If they had objected at the time it was quite possible Mr. Hippert might have

been able to explain the £260 and the £2,900, the purchase price of the Red House. His lordship was not satisfied that when he became executor Hippert could have recovered any portion of the purchase price from anybody else. The fact, however, that he himself was the person who purchased the property from the widow ought not to affect the present case. There was no charge of fraud having been committed by him upon the widow, or of collusion between him and the widow. As to the question of maladministration the executor's accounts showed that there had been negligence by him. Property which he ought to have realised had been left unrealised, and damages had been sustained in consequence of that negligence. The Court upon the claim in reconvention would give judgment for the defendant for £766 5s. 8d., and as it was clear there was a large balance in hand, the plaintiff ought to bear the costs of this action.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorney, G. B. Reitz.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. 1892.
Justice BUCHANAN, and Mr. Dec. 15th.
Justice UPINGTON, K.C.M.G.]

Ex parte LONGDEN.

On the motion of Mr. Searle, Mr. Herbert Thomas Longden was admitted as an advocate.
The oaths to be taken before the Registrar, Eastern Districts Court.

REHABILITATIONS.

On motion from the Bar, the following insolvents were granted their rehabilitation: Abraham Christoffel Botma, Izak Petrus Johannes van der Merwe, William Johnstone, Frederik William Phillips.

PROVISIONAL ROLL.

VAN NOORDEN V. ALFRED H. NISSEN.

Mr. Watermeyer moved for provisional sentence on a promissory note for £10 1s., with interest.

Granted.

MARRIOTT V. HAIGH.

Mr. Graham moved for a writ of civil imprisonment against the defendant, a colour-sergeant in the East York Regiment, upon an unsatisfied judgment of the Supreme Court arising out of recent divorce proceedings.

Mr. Juta appeared for the defendant.

The matter was reserved for argument as to whether a soldier who has incurred a debt of over £80 can be attached under the Army Act, 1881.

GENERAL MOTIONS.

In re THE ANTE-NUPTIAL CONTRACT OF
WALTER H. SCHOLEFIELD AND CONSTANCE
HOLLAND.

Mr. Webber moved for the appointment of a trustee in the matter of the ante-nuptial contract of Walter H. Scholefield and Constance Holland, and asked for an order appointing the secretary of the Ægis Assurance Company of Port Elizabeth to act as trustee under the said contract, the original trustee having died, and there being no provision in the contract whereby a successor can be appointed. Mr. Smith was prepared to accept the trust, and was appointed in his capacity as secretary of the Ægis Company.

IN THE ESTATE OF THE LATE { 1892.
JOHAN C. SCHOEMAN. { Dec. 15th.

Mr. Searle appeared for the petitioners, and asked for an order restraining the Master from granting letters of administration to one of the executors of the said estate until he shall have entered into a security bond to the Master for the due performance of the trust, he being resident in the South African Republic.

Mr. Searle was heard in support of the application, and contended that the case of "Pentz" (2 O.T.L.R., 65) could not be regarded as settling the practice, as there were exceptional circumstances in that case. The previous practice had been to require security, and should be restored.

The Attorney-General was heard on behalf of the Master, who submitted to the judgment of the Court.

Judgment was reserved.*

THE CAPE STOCK FARMING COM- { 1892.
PANY. { Dec. 15th.

Mr. Juta moved for an order in terms of the

* As judgment has not yet been delivered a full report of this case is kept back until the next number appears.—
Ed., 2.1.93.

report and supplementary report of the official liquidator. The report had been fully published, but since publication there had been certain communications between the official liquidator here and the representative of the liquidator in London. The £18,000 available for paying creditors had been increased to the sum of £24,000. Certain opposition was threatened against the report, but an agreement was arrived at, which was embodied in the supplementary report which had not been published. The liquidator now asked that there should be a call of £25 in this colony; the list of contributors to be settled, and out of the amount of their calls the Colonial creditors were to be satisfied. If there was any surplus, that would be paid over to the English liquidators provided they obtained the necessary powers from the Courts in England for a call of £25, out of which they were to satisfy the claims of English creditors.

Mr. Searle, for the English liquidators, agreed that if a call were made it should be equal to a further call made in England.

Counsel drew up the consent paper, and the Court made an order in terms of the supplementary report of 8th December, 1892, as modified by the letter of the same date written by the official liquidator, and signed by counsel.

In re BEST.

{ 1892.
{ Dec. 15th.

Executors — Administrators — Death of — Testator — Directions as to investment — Master of Supreme Court — Guardians' fund — Minors — Sureties for executors dative.

Executors testamentary (who had also been appointed administrators of the testator's estate with directions as to the investment of the residue for the benefit of certain minors during their minority) having died, executors dative were appointed by the Master.

Held, that such executors dative by their acceptance of the trust also became administrators of the estate and that, after having liquidated the estate as executors, they were entitled in their capacity as administrators, to invest the residue in the manner directed by the testator.

Held further, that the Master could not compel them to pay the residue into the Guardians' Fund.

Held also, that the sureties for the executors dative incurred no liability in respect of the performance by the latter of their duties as

administrators after they had finally liquidated the estate as executors.

Distinction between executors and administrators as explained in Hiddings v. Denysen (3 Juta, 424) approved.

Mr. Searle moved for authority to the executors dative to the said estate to keep invested on mortgage for the benefit of the minor heirs the funds already received, and such sums as they may receive in future, instead of depositing the money in the Guardians' Fund.

The testator by his will gave a life interest in his estate to his wife, with remainder to the children of his son Samuel Best. He appointed as executors and administrators of his estate his wife and one James Hodges, both of whom died in 1890, after which event the present petitioners were appointed executors dative.

By a codicil to his will the testator directed *inter alia* that his executors should invest the estate due to the children of his son Samuel Best at interest pending the majority or marriage of each of such children, and pay the said interest to Samuel Best, or to the proper guardian of the minors, for the purpose of educating, maintaining, and supporting them.

The further facts appear sufficiently from the Acting Master's report, which was in the following terms:

Henry Best died on the 10th April, 1884. By will he appoints his grandchildren, children of his son Samuel Best, or their descendants as his heirs, subject to the life interest of his wife, and nominates as his executors his wife Joyce Best and James Hodges, with directions as regards the mode of the distribution of his estate after his wife's death.

Letters of administration were granted in due course to the executors testamentary. The wife and executrix testamentary died on the 28th June, 1890, and the co-executor died on the 25th January, 1890.

The estate being therefore unrepresented, a meeting of the next of kin was held for the election of an executor, with the result that the present executors were appointed by the Master. These executors dative liquidated the estate and rendered an account thereof, showing an amount of £1,095 11s. 4d. due to the minors.

Their functions as executors dative having now ceased the Master demanded that, in accordance with the prevailing custom, the portions of the minors be deposited in the Guardians' Fund for the reason that he has no power to appoint administrators, and that the security given by executors dative does not cover such extensive powers. The executors, however, claim to be

clothed with similar powers as the executors testamentary, and as such entitled to retain the administration of the shares of the minors. Although the Court is fully aware of the fact, it may be permitted to me to say as a reason for the action of the Master that testators appoint as executors and administrators persons in whom they have full confidence, whereas in intestate and unrepresented estates wherein the Master makes the appointment, he sees that the estate is properly accounted for. *Vide* * "Wessels' Executors and Bisset v. Master of the High Court," heard on appeal on the 1st December, 1891.

In this matter two points are raised :

1. Do executors dative appointed by the Master step into the shoes of executors testamentary where a testamentary estate becomes unrepresented?

2. Are executors dative compelled to pay inheritances of minors into the Guardians' Fund?

In *†* "Van Rooyen v. Werner," his lordship the Chief Justice is reported to have remarked: "I am informed that the Master of the Supreme Court would under such circumstances have insisted upon the money being paid into the Guardians' Fund."

I would now respectfully point out how very desirable it is that the Court should give an expression of its opinion whether the Master has the right to insist upon the inheritances of minors being paid into the Guardians' Fund in estates to which executors dative have been appointed.

Although the mode of investment made by the executors would appear to be perfectly safe, and certainly more beneficial to the minors, the Master does not feel justified to authorise a departure from the well-established custom without obtaining the consent of the Court.

Mr. Searle was heard in support of the application.

The Chief Justice, in delivering judgment, said: The Master in his report admits that the executors dative have made a safe and beneficial investment of the residue of the testator's estate.

He admits also that such investment has been made in accordance with the directions contained in the testator's will. He maintains, however, that the directions as to investment apply only to the executors appointed by the will, and that, inasmuch as minors are interested in the residue, it is the duty of the executors dative, who were appointed as such upon the death of the executors testamentary, to pay the money into the Guardians' Fund. The executors dative now

apply for authority to retain the investments as made until the minors become of age; and in the meantime to pay the interest, as it accrues, to the minors.

The mistake which the Master has made is to treat the case as one of intestacy. The deceased Henry Best died testate. By his will he had appointed certain persons as administrators as well as executors, and had given ample directions in regard to the investment of the residue of his estate. The death of the executors nominated by him did not render it impossible to carry out these directions. No doubt the duties in regard to investment which he has entrusted to his executors are those of administrators, or as the English law would term them, trustees rather than executors, but upon their acceptance of the office of executors they also accepted the further trust of investing the residue of the estate for the benefit of the testator's minor heirs.

Upon the death of the executors testamentary their place was taken by the executors dative, whose duty it became to carry out the directions given to the executors appointed by the will. As executors they were bound to liquidate the estate. "But," as remarked by the Privy Council in "*Hiddingh v. S.A. Association*" (5 Juta, 808), "an estate is liquidated when it is reduced into possession, cleared of debts and other immediate outgoings, and so left free for enjoyment by the heirs." When the petitioners had filed their account showing the clear residue, it was for the Master and the tutor of the minor and others interested in the estate to inspect the account, and when no objection was made the petitioners were justified in investing the balance appearing in such account in terms of the testator's directions.

Their duties as executors ended with the liquidation of the estate, and their sureties could incur no liability in respect of the investment of the residue. Such investment was made by the petitioners in their capacity as administrators, and in this capacity they acquired not by virtue of the letters dative granted to them by the Master, but by reason of their having taken upon themselves the trust committed by the testator to the administrators of his estate.

The distinction between executors and administrators was fully explained in this Court in "*Hiddingh v. Denysen*" (8 Juta, 424), and recognised by the Privy Council in the case to which I have already referred.

The petitioners having in their capacity as executors dative liquidated the estate and rendered admittedly proper accounts to the Master, were justified in their further capacity as administrators in investing the residue in the manner directed by the testator.

The authority asked for will therefore be

* 1 C.T.L.R., 311.

† 3 C.T.L.R., 296.

granted, and the costs of this petition ordered to come out of the estate.

[Attorneys for the Executors, Messrs. Van Zyl & Bissainné.]

CARR V. CIVIL COMMISSIONER OF { 1892.
WORCESTER. { Dec. 16th.

Divisional Council—Act 40 of 1889—Inquiry under section 56—Bill of costs—Refusal of Civil Commissioner to tax—Application to compel him refused.

Mr. Juta, for applicant, moved for an order requiring the respondent to tax and ascertain the costs incurred in a certain inquiry held before him under the 56th section of the Divisional Councils Act, 1889, and that respondent do pay the costs of this application *de bonis propriis*.

This was an application on notice calling upon the respondent to show cause why he should not be ordered in terms of sub-section (c) of section 56 of Act 40 of 1889 to tax and ascertain the costs incurred in a certain inquiry held before him under the 56th section of the said Act on the 28th October and 1st November last, and why he should not be ordered to pay the costs *de bonis propriis* of this application.

On 25th October applicant as a registered voter, and a candidate at the election held at Worcester on the 18th October, 1892, for three members for District No. 1 of the Divisional Council of Worcester, lodged a complaint in writing with respondent in terms of section 56 of Act 40 of 1889, that certain twenty-four persons were admitted to vote and did vote at the said election who were not entitled to do so, by reason that all sums due from them in respect of Divisional Council rates made payable three months before the day of voting were not paid by them on that day, as provided for in section 18, sub-section (a) Act 40 of 1889.

In compliance with the said complaint an inquiry, as provided for in section 56 of Act 40 of 1889, was held before the respondent into the grounds thereof on the 28th October and 1st November, 1892, on which latter date the respondent struck off the names of fourteen of the twenty-four persons from the voting papers and ordered "two out of the fourteen to pay the costs of their own notices, and the remaining twelve to pay the costs of service of their notices and of the witnesses' expenses in equal proportions."

On the 21st November, 1892, applicant's attorney presented to the respondent for taxation the bill of costs amounting to £5 6s. 6d., but he declined to tax it, and on the same day the attorney wrote to respondent giving him notice that unless he consented to tax the bill of costs applicant would

be obliged to move the Supreme Court to compel him to do so.

Applicant alleged that before he could recover the costs awarded in his favour it would be necessary that the same should be ascertained and taxed, which the respondent refused to do.

That applicant was liable to, and had allowed a witness, Frederick Lindenberg, an attorney of the Supreme Court, a sum of £1 11s. 6d. for two days' attendance, to which the said witness was by law entitled, and that applicant was further liable to the messenger for the costs of service of the notices on the said fourteen persons, all which costs the applicant was prevented from recovering by reason of the respondent's refusal to tax the costs submitted to him.

The respondent in his affidavit alleged *inter alia* that acting upon what he considered to be the true meaning and intention of the Act, he made an order for the payment of the costs incurred, namely, those of serving notices and of certain witnesses' expenses, by some of the voters objected to, and named in the said order, and directed the said costs to be collected by the messenger of the Magistrate's Court, who served the notices, and paid over to the Clerk of the Court, to be by him disbursed to the persons entitled thereto.

That on the 14th November last he taxed and ascertained the costs in the aforesaid matter and certified the same as required by law, and allowed to F. Lindenberg, secretary to the Divisional Council, the sum of 15s. for witness' expenses.

That on the 19th November, 1892, the said messenger paid to the Clerk of the Court the sum of 15s., being the amount of the taxed bill of costs less the sum of £3 12s. 6d. due to the messenger himself which he retained by his (respondent's) directions. That thereupon respondent directed the clerk to pay the said sum of 15s. to F. Lindenberg for his witness' expenses, but was informed by him (the clerk) that Lindenberg refused to accept the amount.

That Lindenberg gave evidence solely in his capacity as secretary of the Divisional Council, and as such he was strictly entitled to no more than 4s. *per diem* for witness' expenses.

That no application for the taxation of costs was made by Carr's attorney at the inquiry or shortly after, and not until the costs as taxed by respondent had been settled was the aforesaid application made, and that no prejudice could possibly arise to the said applicant by reason of the non-taxation of his bill of costs.

That when applicant's attorney first presented his bill of costs he was fully aware of the fact, that the costs had been previously allowed and ascertained by respondent, and the respondent submitted for the consideration of the Court whether under these circumstances his persisting to demand that a bill of costs, containing an

increased amount of witness' expenses to Lindenberg (viz: £1 11s. 6d. instead of 15s.), who is likewise an attorney sometimes practising in the Resident Magistrate's Court, should be taxed by respondent, was such conduct as entitled him to any relief under the 81st section of the Act.

Mr. Juta was heard in support of the application.

The Attorney-General was heard for the respondent, and contended that the applicant had mistaken his remedy, he should have proceeded under the 59th section of the Act if he had any cause of complaint.

The Chief Justice, in delivering judgment, said the object of the application was to compel the respondent, the Civil Commissioner of Worcester, to tax a bill of costs tendered to him for taxation. Now a bill of costs could only be taxed in case the person who tendered it for taxation had obtained an order as to costs, and in order to ascertain in the present case whether such an order had been made, they must refer to the judgment given by the Magistrate in this case. The judgment was that the remaining twelve voters were to pay the costs of service on witnesses and the witnesses' expenses in equal proportions. There was nothing in the order giving applicant any right to costs, and therefore it was quite clear that applicant was not in a position to tender to the Civil Commissioner any bill for taxation. But it was contended in the present case that the applicant himself had incurred a liability to the messenger and to the witnesses, and that because of this liability the Civil Commissioner was bound to tax the bill of costs. The answer to that was that it was not in consequence of anything the Civil Commissioner did that any liability attached to the applicant. The Civil Commissioner did not request the applicant to be responsible to the messenger for the cost of service, nor did the Civil Commissioner request the applicant to be responsible for the expenses of the witness, Mr. Lindenberg. Therefore the mere fact that the liability was incurred by applicant towards the messenger and towards the witness Lindenberg would not be a reason why the Civil Commissioner, in the absence of an order for costs, should be compelled to tax the bill. His lordship was by no means satisfied that there was any liability incurred. If Lindenberg had any complaint that he had not his full expenses awarded to him, then let him make his complaint in the usual way. The applicant had no interest whatever in obtaining a larger sum than that which had been awarded. But a much larger question had been raised as to whether the proceedings before the Civil Commissioner should be treated as strictly judicial or not. If these proceedings had been intended to be strictly judicial, they

would have been more analogous to the practice of the Magistrate's Court. But that was not a question which this Court need fully enter into. There was no reason why the Civil Commissioner should be called upon to tax the bill of costs when there was no order in favour of applicant as to costs. The application must therefore be refused with costs.

[Applicants' Attorneys, Messrs. Van Zyl & Buissin ; Respondent's Attorney, C. C. de Villiers.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 1892.
K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Dec. 16th.
Justice UPINGTON, K.C.M.G.}]

MCINTYRE V. MCINTYRE.

This was an action for divorce on the grounds of defendant's adultery. Mr. Watermeyer for plaintiff; defendant in default.

David James McIntyre, plaintiff, assistant lighthouse-keeper, Cape St. Francis, deposed that he was married to his wife on the 20th December, 1887. At that time he was a seaman in the Royal Navy. On the 28th February, 1890, he left the Navy, and was appointed to the lighthouse at the Roman Rock, Simon's Town. His wife lived at her sister's house. Later on he took a house for himself. He arranged, while he was away, that a girl named Janet Breede should sleep with his wife. On 1st June, 1891, he received information which induced him to proceed with this action. He had had no communication with his wife since. On 19th June, 1891, he went to Cape St. Francis. There was one child of the marriage, and he wanted the custody of it. Janet Breede and Caroline Williams gave evidence as to having seen a seaman enter Mrs. McIntyre's bedroom and stay there during the night, he being absent.

The Court granted a decree of divorce with forfeiture of the benefits, plaintiff to have custody of the child.

[Plaintiff's Attorney, John Ayliff.]

In re THE CAPE CENTRAL RAILWAYS.

Liquidator's Report.

The Attorney-General presented a further special report of the official liquidator respecting the sale of the company's property.

The report was as follows :

1 Mr. Langton Thomas, to whom a sale of the *ine* was sanctioned by the Chancery Division of the High Court of Justice in England, and by this Honourable Court, having made default in payment of his purchase money and fulfilment of the terms of his contract, an order was made by the said Chancery Division of the High Court on the 21st day of May last declaring the sum of £5,000 deposited by the interested purchaser absolutely forfeited to the vendor, and that the said agreements were void.

2. Thereafter, on the 12th day of August, 1892, the official liquidator in England entered into an agreement with one Thomas Lewis Nottage by which, after certain recital not necessary to be stated in detail, it is declared that the vendor, the said official liquidator, shall sell, and the said Nottage, as purchaser, shall purchase the property of the company in liquidation and its assets (after payment of such sums out of the said assets as may be payable for remuneration to the liquidator, and the costs, charges, and expenses of and relating to the liquidation, together with a sum of £200 payable to certain persons in respect of debentures of the company, which were issued prior to the issue of the debentures for £125,000) for the consideration following :

I. £98,400 in 8,986 fully-paid-up debentures of £25 each, part of a total of £100,000, bearing interest at the rate of 4 per cent. per annum, to be issued by the New Cape Central Railways (Limited), a company in the said agreement more fully described.

II. The sum of £200 in cash.

III. £98,680 in 19,886 fully-paid-up £5 shares, part of a total issue of £100,000 shares of the said new company.

3. The purchaser further to pay all costs, charges, and expenses of every kind of himself and of the intended new company subsequent to the incorporation thereof, and also all costs, charges, and expenses of every kind investing the property sold in the new company.

4. The agreement further provides that upon the formation of the new company the shares and debentures above mentioned shall be issued to the vendor or as he shall direct, and shall be applied as follow :

£5,000 of debentures and £5,000 of shares shall be issued to the vendor in satisfaction and discharge of his commission, remuneration, and charges in relation to the sale; and the residue of the shares and debentures shall be distributed to the debenture-holders in the company, mentioned in the schedule annexed to the agreement in the proportions therein appearing; and the said sum of £200 in cash shall be distributed amongst certain of the debenture-holders, as also shown in the said schedule

5. The agreement further contains certain stipulations (not necessary here to be set out), as upon reference thereto will appear.

6. On the 7th day of September, 1892, the Chancery Division of the High Court of Justice in England, after hearing the parties thereto named, ordered in the following terms :

" It is ordered that the conditional agreement, dated the 12th August, 1892, entered into between Tom Drew Bear, of 71A, Queen Victoria-street, in the City of London, merchant, of the first part; the Cape Central Railways (Limited), by the said Tom Drew Bear, its official liquidator, of the second part; and Thomas Lewis Nottage, of 25, Powell-road, Clapton, in the county of Middlesex (the purchaser), of the third part; for the sale to the said Thomas Lewis Nottage of the property at the Cape of Good Hope known as the Cape Central Railways, and the lands, stations, bridges, and other buildings and appurtenances belonging thereto, and the loose plant and stores used in connection therewith, and other the premises therein particularly mentioned, on the terms and conditions therein mentioned, be confirmed and carried into effect, and that the funds in court be dealt with as in the schedule hereto (the sum of £200 therein mentioned being for payment of fees payable on registration of the New Cape Central Railways (Limited) in the said agreement mentioned). And it is ordered that the cost of the said debenture-holders of this application, and consequent thereon, be taxed by the Taxing Master.

7. The debenture-holders mentioned in the order as being represented and heard upon the application were the following, holding debentures to the amount set opposite to their respective names: A. C. Ashton, £500; Job Ashton, £15,000; W. S. Ashton, £100; Wm. Bohm, £100; R. E. Cooper, £6,050; W. Cunliffe, £9,850; W. Denman, £9,000; George Davis, £2,250; D. Hartland, £100; Drew & Co., £27,150; Edridge, £8,000; Houlder Bros., £1,050; Lloyds' Bank, £100; J. Dick Peddie, £750; David Reid, £19,500; Sir A. Slade, £900; P. G. van der Byl, £50; James Wiley, £5,700; Emily Winkley, £50; total, £119,000.

8. In proof of the matters aforesaid, the liquidator annexes hereto the following documents :

(a) The said order of the Chancery Division of the High Court dated 21st May, 1892.

(b) The said agreement with Thomas Lewis Nottage, dated 12th August, 1892.

(c) The said order of the Chancery Division of the High Court, dated 7th September, 1892.

9. Due notice of this application was given in the *Government Gazette* of the 28th October, 1892, a printed copy of which is annexed, marked D.

10. The official liquidator, in submitting this report and its annexures, prays :

I. The assent of this Honourable Court to the said order of the 21st May, 1892, forfeiting the £5,000 paid by Langton Thomas under his contract, and declaring that the agreements with him therein recited are respectively void.

II. The assent of this Honourable Court to the terms of the said order of the 7th September, 1892, and that the official Liquidator be authorised to, and directed to, do all things necessary for carrying the same into effect in accordance with and subject to the provisions and requirements of the said agreement, dated the 12th August, 1892.

III. Or for such other order as this Honourable Court may deem fitting in the premises.

THOMAS SCANLEN, Official Liquidator.

Cape Town, the 5th day of November, 1892.

The Court confirmed the report.

IN THE ESTATE OF THE LATE { 1892.
ANNA SYFRET. { Dec. 16th.

Mr. Searle moved for authority to the Master to pay over to the executors of the estate of the late Edward J. M. Syfret the amount of inheritance due to Beatrice S. Syfret, in order that the same may be administered in terms of the wills of the father and mother of the petitioner.

This was the petition of Beatrice Sophia Syfret, a daughter of the late Edward John Maynard Syfret and his predeceased spouse, Anna Syfret. On the 4th December last the petitioner attained the age of twenty-one.

By the will of petitioner's mother it was provided that, except for certain purposes therein mentioned, the share of her inheritance due to petitioner should not be paid to her until she had attained the age of twenty-five years.

Petitioner's father was appointed executor of the said will and guardian of petitioner, but at his death the Board of Executors, who were with others executors of the will of the said E. J. M. Syfret, took out letters of administration jointly with Edward Ridge Syfret as executors *ad litem*.

In the will of the said E. J. M. Syfret it was provided as a condition of petitioner's receiving certain benefits under his will, that she should agree to the moneys due to her under her mother's will being placed under *fidei commissum*, and it was desired by petitioner that this should be done.

On the 1st July, 1890, the Board of Executors paid into the Guardians' Fund the maternal inheritance due to the petitioner for her account.

The Master recently notified to petitioner that he would discontinue to pay interest on the said inheritance after December 4, and he has refused to pay the said inheritance to petitioner without an order of Court on the ground that she is not entitled to receive it until she is twenty-five

years of age, the money thus lying idle for four years, to the great disadvantage and loss of petitioner.

Petitioner alleged that it would be to her benefit that her inheritance should be paid over to her two brothers, E. R. and A. G. Syfret, to be invested on her behalf and administered consistently with the said two wills. E. R. Syfret was with others appointed petitioner's guardian under the will of her late father.

Petitioner prayed the Court to order the Master to pay to the said E. R. and A. G. Syfret the sums of money due to her out of the estate of her late mother, to be administered in terms of the wills of her mother and father.

The petition was referred to the Master, and he recommended that the request of the petitioner should be acceded to.

The Court ordered the petitioner's maternal inheritance to be handed over to her brothers, to be invested by them for her benefit.

[Petitioner's Attorneys, Messrs. Scanlen & Syfret.]

DU PLESSIS V. DU PLESSIS'S EXECUTRIX.

Mr. Searle asked for an order declaring executable in respect of a judgment of the Court of the Resident Magistrate for Oudtshoorn, certain life interest accruing to her, by virtue of the mutual will of her late husband and herself, in portions of the farm called Draaihoek, in the division of Oudtshoorn.

The Court granted the order.

ZURING V. ZURING.

On the motion of Mr. Tredgold, leave was given plaintiff to sue *in forma pauperis* in an action for divorce.

REGINA V. MENTOR KAMIER. { 1892.
{ Dec. 16th.

Post driver—Drunkennes—Act 4 of 1882, section 37, sub-section 9—Contravention—Conviction sustained on appeal.

This was an appeal from a sentence passed upon the appellant, a postcart-driver, by the Resident Magistrate of Clanwilliam.

The prisoner was "charged with the crime of contravening section 37, sub-section 9 of Act 4 of 1882, in that being the driver of the cart for the conveyance of the mails between Clanwilliam and Calvinia, the said Mentor Kamier, on or about the 9th day of November, 1892, at Clanwilliam, wrongfully and unlawfully became intoxicated, and was

intoxicated at the time that the mail was forwarded by such cart, and under his charge, on or about the date aforesaid from Clanwilliam to Calvinia."

The prisoner being arraigned pleaded not guilty. He was found guilty and sentenced to pay a fine of £2, and in default of payment to undergo fourteen days' imprisonment with hard labour.

The Postmaster, at the hearing of the charge, swore that the prisoner was intoxicated on the night in question, and his evidence was corroborated by an official of the Telegraph Department.

From the evidence of another witness it appeared that the prisoner told the postmaster, who held a lantern up to his face, that he was not drunk.

Other witnesses who were called swore that the prisoner was not drunk, and that he was capable of driving the postcart.

Mr. Searle was heard in support of the appeal, and contended that the conviction was against the weight of evidence and should be quashed.

The Attorney-General, for the Crown, was not called upon.

The Chief Justice, in giving judgment, said in his experience of criminal trials there was nothing more difficult to prove than drunkenness, because different persons had such different ideas as to what constituted intoxication. It was not at all unusual to have several witnesses who said that the man was sober and an equal number swearing that he was drunk. The judge or jury or the magistrate must do the best they could to arrive at a conclusion as to which was right. In the present case the evidence was not very strong, but at the same time there was the evidence of the postmaster and the man in the Telegraph Department, and both said that the prisoner was intoxicated, and both swore positively that he smelt strongly of drink. Then they also said that he was a civil man when sober, but on this occasion he took offence because a lantern was held in his face; and before the charge was made against him of drunkenness, he excused himself and said, "I am not drunk," which was a sign that he was not quite sober. Taking everything into consideration the Magistrate was justified in believing these two witnesses. If he believed them his judgment must be upheld. It was admittedly a very serious offence, and the fact that it was so serious made it the bounden duty of every post-driver to be as sober as possible. The appeal must be dismissed.

[Appellant's Attorneys, Messrs. Van Zyl & Buismann.]

RUDD V. DE VOS. { 1892.
Dec. 16th.

Defamation—Innuendo—Declaration—Exception.

A declaration for defamation setting out words which are not per se defamatory and containing an innuendo which is not reasonably justified by those words is bad.

Exception allowed to a declaration stating that in the course of a conversation with reference to certain transfers not being in order, the defendant said "that could not be otherwise because R. (the plaintiff) filled in the conditions after the sale and altered them," and containing the innuendo that the defendant meant that "the plaintiff had wilfully and fraudulently altered the conditions and was thus guilty of fraud and forgery."

Mr. Juta appeared for the plaintiff, and Mr. Searle for the defendant.

This case came on for argument on certain exceptions taken to the 2nd and 3rd paragraphs of the declaration which were in the following terms:

2. On or about the 19th October, 1892, and at the residence of Willem Schoeman, a farmer, at Kombuis, Cango, and in the presence and hearing of the said Willem Schoeman, John Henry Clarence Ross, Beatrice Elizabeth le Roux, and others, the said defendant falsely and maliciously, and with intent to injure the plaintiff in his reputation and business, spoke of and concerning the plaintiff in a conversation between the aforementioned persons with regard to the transfers and conditions of sale in certain sales of land held by the plaintiff as auctioneer for and on behalf of one Le Roux not being in proper order, the following defamatory words in the Dutch language: "That could not be otherwise because Rudd (meaning thereby the plaintiff) filled in the conditions of sale (meaning thereby the conditions under which the plaintiff as auctioneer had sold the land) after the sale and then altered them."

3. By the said words the defendant meant and imputed, and was so understood by the aforementioned persons, that the plaintiff had wilfully and fraudulently altered the conditions of sale, and was thus guilty of fraud and forgery.

The defendant excepted to the declaration on the following grounds:

(a) That the said declaration is vague and embarrassing, inasmuch as no definite accusation or charge is alleged to have been made against the plaintiff; nor it is alleged in what manner the conditions of

sale were altered, nor that they were altered in any material particular.

(b) Further, that the words in any material particular used do not bear out the innuendo placed upon them in paragraph 8, inasmuch as it is not alleged that the conduct of the plaintiff in filling in the said conditions of sale and altering them was done to the prejudice of any person, or that any person could be prejudiced thereby; and therefore no allegation of fraud or forgery could be imputed by the said words.

Wherefore he prayed that the declaration be set aside with costs.

Mr. Searle was heard in support of the exceptions, and contended that the plain meaning of the words used could not bear the construction put upon them.

Further, there should have been an allegation that some person had been prejudiced by the conduct of the plaintiff.

What plaintiff was alleged to have done could not in any case amount to fraud or forgery. The declaration was imperfect as it stood, and should be amended before the defendant was called upon to plead to it.

Generally on the question of demurrer, he cited the following cases:

"Gomperts v. Levy" (9 A. and E., 282); "Wheeler v. Haynes" (9 A. and E., 286); "Day v. Robinson" (1 A. and E., 554), "Holt v. Scolefield" (6 D. and E., 691), and "Goldstein v. Foss" (4 Bing, 489). He also referred to Folliard on Libel, pp. 357-9.

Mr. Juta urged that the words complained of clearly imputed fraud. Much depended upon the manner in which the words were spoken. Some one must be injured by the transfers being out of order. The words used were capable of bearing the construction put upon them.

The Chief Justice said: This is an action for damages for defamation. There could be no defamation unless the words alleged to have been used by the defendant were defamatory. To decide whether words are defamatory or not their plain meaning is of course the first consideration, but the context in which, the circumstances under which, and the tone in which they were spoken are not to be lost sight of. For instance, to say that a certain individual is an "honest attorney" is at first sight perfectly harmless, but the words may be spoken under such circumstances, and in such a tone, as clearly to convey to the hearer the imputation of dishonesty in his profession to the attorney. But the language must be such as to be capable of the construction. The mere fact that the hearers understood it in a defamatory sense does not make it defamatory unless they were reasonably justified in so understanding it. A declaration therefore setting out words which are not *per se* defamatory, and containing an innuendo

which is not reasonably justified by those words, is clearly bad. The declaration in the present case states that in the course of a conversation with reference to certain transfers not being in order the defendant said: "That could not be otherwise," that is to say, the transfers could not but be out of order, "because Rudd (the plaintiff) filled in the conditions of sale after the sale and then altered them." The innuendo relied upon, as an inference from these words, is that "the plaintiff had wilfully and fraudulently altered the conditions of sale, and was thus guilty of fraud and forgery." There is, in my opinion, no justification whatever for this inference. Those who heard the words might perhaps fairly have inferred that negligence or incompetence was imputed to the plaintiff in his capacity as auctioneer, but they were not reasonably justified in inferring an imputation of fraud and forgery. The objection to the declaration has properly been taken by way of exception, which must be allowed, with costs.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendant's Attorney, ———]

PATN V. YATES. { 1892.
Dec. 16th.

Pledge — Sale — Delivery — Possession — Attachment — Interpleader — Messenger — *Constitutum possessorium*.

B., the owner of certain cattle, having agreed to pledge them to P. as security for money advanced, requested J., who had theretofore kept them for B., to keep them in future for P.

Thereafter J. agreed with P. to keep them for P., the pledgee, as his mandatory, and upon the same terms upon which they had been kept for B., the pledgor.

The messenger of a Magistrate's Court attached the cattle on J.'s farm in execution of a judgment against B. at the suit of Y.

Held, reversing the Magistrate's decision in an interpleader suit, that at the time of the attachment there was a valid subsisting pledge of the cattle to P. and that they ought not to have been declared executable at the suit of Y.

This was an appeal from a judgment of the Acting Resident Magistrate of Mount Frere in an interpleader action, in which the appellant claimed certain cattle, seized by the respondent to satisfy a judgment obtained by him against one Biddulph.

At the hearing of the case Payn gave the following evidence: I reside in Mount Frere, and am an hotelkeeper and cattle speculator. During the last two years I have had several transactions with Mr. Biddulph. I had one last May. He was then owing me a considerable sum of money. I asked him for payment. When I asked him for payment he asked me for an advance in cash of £19. I said that I would if he could give me some security. He offered me a span of oxen that were then running at Jasson's. The £19 was to pay Mr. Davies. I paid the £19 to Mr. Davies myself. I produce my ledger which shows an advance to Biddulph on the 16th May of £19. His account continued to increase, when I again in July demanded payment of my account. I told him that if the account which he owed was not paid by 25th July, I would take possession of the span of oxen which he had given me as security for £19 paid to Mr. Davies. I do not think he saw me on the 25th July, but he saw me in the beginning of August. I then told him that I had credited him with sixteen head of oxen in my book at £4 each. He first of all wanted £5, which I refused, and offered him £4, which he agreed to accept. The cattle were still at Jasson's. I asked Biddulph to arrange with Jasson to keep the cattle for me on the same terms on which he had been herding the cattle for him. He (Jasson) was to be allowed to plough with them and bring wood into Mount Frere. I left them at Jasson's because they were accustomed to the veld there. Their condition was very low at that time. It was in the winter, and it would not have been wise to have removed the cattle then. I saw Jasson some time afterwards. It was about a month afterwards. I had a conversation with Jasson about his looking after the cattle for me. I sent Basson and Pym out to Jasson's on one occasion to see how the cattle were getting on. Basson has the supervision of all my cattle, and does most of the buying. The cattle in question were often in Mount Frere in Jasson's possession. I lent them once to Biddulph to take his wife out. Mr. Biddulph still owes me a considerable sum of money, viz., £28 8s. 0½d. I could have taken possession of the cattle in the care of Jasson at any time, and exercised full control over them. My ledger shows the credit for the oxen of £64 in July. In the conversation I had with Biddulph, in the early part of July, it was agreed that I was to take over the cattle at £4 if his account were not paid by the 25th July.

Biddulph, Basson, and Jasson corroborated the evidence of the last witness.

The Acting Resident Magistrate gave judgment for the defendant with costs, declaring the cattle in question executable at the suit of Yates.

The Assistant Resident Magistrate gave the following reasons for his judgment:

In this case the claimant (Pays) calls upon the respondent (Yates) to show cause why certain cattle seized on his (Yates's) behalf by the Messenger of the Court in the case of J. J. Yates v. Biddulph should not be restored to him (Pays).

It is proved that Biddulph—as security for a debt which he owed Pays—offered him sixteen head of cattle, which he did not point out, and which he stated were running with one Jasson.

Pays accepted the security, but he states that during July he and Biddulph agreed that if the latter's debt were not paid on the 25th that the former should take over the cattle at £4 a-piece. The debt not being paid, Pays took over the cattle by crediting Biddulph with the value agreed upon, viz., £64.

Pays now claims these cattle as his property. Following the law as laid down in "Goosen's Trustee v. Goosen" (8 E.D.C., 268; 1 App. Cas. 414) I do not think that the claimant can succeed. In that case, as in this, the pledge was accepted, and then, as now, the cattle were left in the possession of the pledgor, contrary to the special rule of the Roman-Dutch law, founded on custom (Voet, 26, 1, 12), which forbids the extension of the doctrine of *constitutum possessionum* to pledge of movables unless the pledge (then hypothecation) is further evidenced by a notarial bond duly registered, in which case the hypothecation would be valid.

These requirements not having been fulfilled in the present case, I consider that the claimant has failed to make good his claim. Judgment will therefore be for the respondent with costs.

From the above judgment the present appeal was brought.

Mr. Searle was heard in support of the appeal, and contended that the transaction between Pays and Biddulph was strictly *bona fide* and valid. The Magistrate had erred in the view which he had taken of the law. He cited "Brown v. The Messenger of the Resident Magistrate's Court, Queen's Town" (Buch. 1876, p. 49), and "Van der Venter v. Moss & Webb" (4 E.D.C., 222).

Mr. Juta was heard for the respondent.

The Chief Justice said: The Court must look at the substance of this transaction. If Biddulph and Pays, the appellant, really intended that there should be a pledge of the cattle by the former to the latter, the fact that they called it a sale would not make it a sale. The Magistrate, therefore, took the proper course in inquiring whether, under all the circumstances, the cattle had been pledged instead of sold to Pays. He came to the conclusion that the transaction amounted to a pledge, and with this view I am not prepared to find fault. Assuming then that a pledge was intended, the question to be determined is whether, at the time

when the messenger attached the cattle, there was a valid subsisting pledge of the cattle to Payn. It is common cause that if they were then in the possession of Payn, they could not be attached at the suit of Yates, the respondent. It is also common cause that if they were still in the possession of Biddulph, the pledgor, then Payn would have had no such real right in them as could defeat the messenger's right to attach them in execution of the judgment against Biddulph. In whose possession, then, were the cattle when the messenger attached them at Jasson's farm? Jasson, it is true, was keeping them on his farm, but he did so for someone else. He was not, in the legal sense of the term, the possessor of the cattle. They had been sent to him by Biddulph to keep, but after the agreement to pledge Biddulph told him that Payn had become the owner, and that they were to be kept in future for Payn. Jasson at first objected, but on being told that he might keep them on the same terms as hitherto—that is to say, that he could use them on his farm—he consented. The matter did not rest here. Payn sent his servant Basson to the farm to inspect the cattle. Afterwards Jasson met Payn, although not on the farm, and it was agreed between them that the former should keep the cattle for the latter upon the terms upon which they had been kept for Biddulph. Under this arrangement the cattle were on the farm when they were attached by the messenger. It is obvious from these facts that it is not necessary for Payn to resort to the doctrine *constitutum possessorium* for the purpose of sustaining his *jus in re*. That doctrine applies where a person, who is already a legal possessor, undertakes to become the possessor for someone else; whereas Jasson never was the possessor in the legal sense of the cattle. The last case in which I discussed the doctrine was that of "Orson v. Reynolds (2 App. C., 102), and no practical purpose would be served by a fresh attempt to elucidate the principles upon which the *constitutum possessorium* rests. In the case of a pledge, the supposed pledgee has no real right in the thing alleged to be pledged unless he is in legal possession of it. No case has yet to my knowledge arisen where the facts have justified this Court in holding that the pledgor has validly constituted himself the possessor of the thing pledged on behalf of the pledgee, so as to make the continued detention of the thing by the former equivalent to possession by the latter. But we have now to deal with the case of a third person, who kept certain cattle as mandatory for the pledgor. So long as Jasson was such mandatory the cattle was in the legal possession of Biddulph the pledgor. But by agreement between Biddulph and Jasson the mandate came to an end, and the latter undertook to keep the cattle for Payn the pledgee. A further agreement was entered into

between Payn and Jasson, under which the latter became mandatory for Payn. There is no reason in law or in common sense why Payn should not be held in this manner to have obtained delivery and kept possession of the cattle. At the time of the seizure by the messenger, there was a valid subsisting pledge of the cattle to Payn, and the appeal from the judgment declaring them executable at the suit of Yates must therefore be allowed with costs in this Court, and in the Court below.

Mr. Justice Buchanan concurred, and remarked that in this case the agent who had possession in his capacity was changed from the agent of the pledgor to the agent of the pledgee.

Sir Thomas Upington also concurred, and observed that in the absence of any *mala fides* in this transaction, the appeal ought to be allowed.

The Court accordingly declared that the cattle were not executable at the suit of Yates.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, (K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.) 1892. Dec. 19th.]

PROVISIONAL ROLL.

COLONIAL MUTUAL V. ABRAHAM AURET.

Mr. Jones moved for provisional sentence for £1,604 11s. 11d., being the balance due on a mortgage bond for £7,450, with interest thereon. Granted.

PAARL FIRE ASSURANCE V. MINNAAR.

Mr. Maskew moved for provisional sentence for £8,200 on a bond originally passed for £8,500, with interest thereon from 1st January, 1891, less £70 9s. 7d. paid on account. The bond became due by non-payment of interest. He also asked that the property be declared executable. Granted.

FARRAR AND CO. V. BAARTMAN.

Mr. Webber moved for provisional sentence for £480 on a promissory note, £100 of which had been paid. Granted.

MOSTERT V. WM. ANDREW AMYOT.

Mr. Graham moved for provisional sentence for £51 11s., with interest thereon from 21st October, 1892, being the amount of a cheque given in favour of plaintiff.

Granted.

LANDSBERG V. DOEFLING

Mr. Joubert moved for provisional sentence for £9, being interest on a mortgage bond of £150.

Granted.

ADMISSION.

On the motion of Mr. Graham, Mr. John Cornelius Coghlan was admitted as an attorney and notary; the oaths to be taken before the Registrar at Kimberley.

REHABILITATIONS.

On motion from the Bar, the following insolvents were granted their rehabilitation: Heldrick Stoltenheff, R. A. van der Merwe, and Oscar Donian.

SMIT V. SMIT.

Mr. Sheil appeared for the plaintiff; the defendant was in default.

This was an action for restitution of conjugal rights, failing which for divorce, instituted by the plaintiff against his wife by reason of her malicious desertion.

Mr. Norman Lacy, of the Colonial Office, gave formal evidence as to the marriage.

Petrus Johannes Smit, plaintiff, deposed that he was married to the defendant on Christmas Day, 1871. Eight children were born of the marriage. He lived with his wife until March last year, when she deserted witness and went to live with another man. If his wife would come to witness and confess her fault, he would take her back. If she did not return, he was anxious to have the custody of the children. He had tried to persuade defendant to return, but she seemed partly angry and partly ashamed. She and the children were living in Clanwilliam.

The Court made the order for restitution of conjugal rights, defendant to return to plaintiff by the 1st February, or to show cause by the 9th February why a decree of divorce should not be pronounced, and why plaintiff should not have the custody of the children.

[Plaintiff's Attorney, G. Montgomery Walker.]

GENERAL MOTIONS.**SECRETARY OF WAR V. METROPOLITAN AND SUBURBAN RAILWAY COMPANY.**

This was a motion for an order that the rule interdicting the respondent from transferring to William A. Philip and John Walker certain land near the Amsterdam Battery, formerly belonging to the War Department, expropriated for railway purposes do continue, and that respondents pay the costs of this and the previous applications.

On the motion of Mr. Juta, the matter was allowed to stand over until the 12th January, the interdict to continue.

The Attorney-General, for the applicant, offered no objection to this course.

**BIDDULPH V. YATES. { 1892.
{ Dec. 19th.**

Transkeian territory—Proclamation No. 112 of 1879—Procedure in appeal—Transmitting record.

The procedure in the Magistrates' Courts of the Transkei and Griqualand East in regard to appeals to the Supreme Court in civil cases is regulated by the Proclamation No. 112 of 1879 and not by the Magistrate's Court Act, 1856.

The applicant, against whom judgment was given in the Magistrate's Court of Mount Frere, noted an appeal within fourteen days after judgment and deposited one pound, but the Magistrate refused to forward the record to the Supreme Court on the ground that the time for appeal had elapsed.

Held, that as the provisions of the Proclamation had been complied with the Magistrate was bound to transmit the record.

Mr. Searle moved for an order requiring the Acting Resident Magistrate of Mount Frere to forward to this Court the records in a case heard in the Court below between the said parties, in which notice of appeal was lodged. Mr. Juta appeared for the respondents.

This motion raised an important point as to the procedure to be adopted in noting appeals from the decision of a Resident Magistrate in the Transkei, including Griqualand East.

Under the Proclamation 112 of 1879, section 25, provision is made for appealing from a judgment of a Resident Magistrate to the Chief Magistrate, notice of appeal must be given within fourteen

days from a judgment, and a deposit of £1 made.

By Act 40 of 1882, section 21, the appeal may be prosecuted either in the Chief Magistrate's Court, or in the Supreme Court or Eastern Districts Court, as the party to any civil suit, action, or proceeding may elect.

In the case under consideration an appeal was noted to the Supreme Court, but the deposit required by Act 20 of 1866, schedule B, rule 88, had not been made, nor had the appeal been noted on the next Court day, as required by the same rule.

The Acting Magistrate being of opinion that the effect of Act 40 of 1882 was to bring the procedure in cases in which an appeal is noted to the Supreme Court into conformity with that required in ordinary cases of appeal from Resident Magistrates in the Colony, and that procedure not having been adopted in the present case, refused to transmit the record to the Registrar of the Supreme Court.

Application was now made for an order in the nature of a *mandamus* to compel him to forward the record.

Mr. Searle was heard in support of the motion, and contended that the provisions of section 25 of the proclamation having been complied with, the proper procedure had been adopted. Act 20 of 1866, rule 88, schedule B, did not apply, nor had that rule been incorporated into the proclamation by Act 40 of 1882.

Mr. Juta, for respondents, contended that the procedure required by rule 88, Act 20 of 1866, had been incorporated into the proclamation by the subsequent Act, in cases in which an appeal is noted to the Supreme Court, and that the Magistrate was correct in refusing to transmit the record.

The Chief Justice said: It is admitted on behalf of the respondent that immediately after the issue of Proclamation No. 112 of 1879 there was no appeal from the Transkeian Courts either to the Supreme or to the Eastern Districts Court. The concluding passage therefore of the 28th section, providing that the proceedings should, as far as circumstances would permit, be the same as those of the Colonial Magistrates' Courts, could not have been intended to apply to proceedings in appeal to the Supreme Court. The 25th section of the proclamation gave the unsuccessful suitor fourteen days to decide whether he would appeal or not, and required a deposit of only £1 instead of £1 17s. 6d., as in the Colonial Magistrates' Courts. In 1882 the Act No. 40 of that year was passed, and the 21st section of that Act enacted that "any person being a party to any civil suit pending in the Court of any Resident Magistrate, in the territories known as the Transkei and Griqualand East, may appeal either to the Chief Magistrate thereof in the manner provided by the 25th section of the proclamation, or to the Supreme

Court." The question is, whether the effect of this section is to require for the purpose of an appeal to the Supreme Court the same preliminary procedure as is required in the Magistrates' Courts of the Colony proper. Something may be said in the affirmative view, but still the difficulty is this, that the Legislature, if it had intended to incorporate that procedure, would have said so. The difficulty is increased when it is borne in mind that the 20th section of the Act specially provides that in regard to appeals in criminal cases the Resident Magistrate's Court Act of 1876 should apply. On the whole the arguments are in favour of the view that the same procedure which applies to appeals to the Chief Magistrate should apply to appeals to the Supreme and Eastern Districts Courts. The balance of convenience also would be in favour of appeals from the same Court being regulated by the same procedure, whichever Court may be appealed to. The appellant having complied with the requirements of the proclamation by depositing £1, and noting his appeal within fourteen days, is now entitled to claim that the record shall be transmitted to this Court. The application must therefore be granted, but the costs will abide the result of the appeal.

[Appellant's Attorneys, Messrs. Van Zyl & Buissonné; Respondent's Attorney, Messrs. Findlay & Taik.]

MARRIOTT V. HAIGH. { 1892.
Dec. 19th.

Soldier—Execution against person—Debt over £30—Army Act, 1881—Civil imprisonment.

Judgment for £35 having been given in favour of a sergeant in an Imperial regiment against another sergeant as damages for the defendant's adultery with the plaintiff's wife,

Held, in an application for a writ of civil imprisonment against the defendant, that as the defendant had no means beyond his daily pay, and would soon leave the Colony with his regiment, the application should not be granted.

Semble, that the judgment being for over £30 execution can issue against the defendant's person under the 144th section of the Imperial Army Act, 1881.

Mr. Graham moved for a writ of civil imprisonment against the defendant upon an unsatisfied judgment of £86 (damages awarded in the recent

divorce case of *Marriott v. Marriott and Haigh*), with costs of suit.

Mr. Juta appeared for the defendant.

William Stephen Haigh on oath deposed that he had no property whatever. He had no money. Cross-examined: Some two years ago he had money in the Savings Bank, but he had none now. He was in receipt of four shillings a day.

By the Court: It took the whole of his pay to keep him.

Mr. Graham contended that both under the Mutiny Act and under 144th section of the Army Act of 1881 the defendant could be imprisoned for a debt of over £80. He cited *Dacey* on the Constitution, p 276.

Mr. Juta for the defendant.

The Chief Justice said: The 144th section of the Army Act, 1881, is certainly very obscure, but upon the whole I incline to the opinion that the Court is empowered to issue execution against the defendant's person upon a judgment for upwards of £80. But he has proved to our satisfaction that he has net property or means sufficient to satisfy the judgment in whole or in part. It is true that he has his daily pay of four shillings, and, under ordinary circumstances, the Court might have granted the writ, subject to its being suspended so long as the defendant pays over to the plaintiff every month a reasonable portion of his pay. But the regiment to which he belongs is to leave the Colony within two months, and no practical benefit would accrue to the plaintiff from such a conditional decree. The application for a decree of civil imprisonment must therefore be refused.

Mr. Justice Buchanan concurred. The writ, he said, might be granted, but how the writ was to be put into execution was quite another thing.

The Court made no order as to costs.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorney, J. Hamilton Walker.]

VARKEVISSEER AND ANOTHER V. BARNARD.

Mr. Graham, for plaintiff, moved for an order requiring the respondent, his family, and all claiming under him to quit and give up possession of the undivided share belonging to applicants of the farms Diep River and Ruigtevlei, in the district of George.

Counsel cited "*In re Olivier's Insolvent Estate*" (2 C.T.L.R., 161).

Mr. Juta was heard for the respondent.

The Chief Justice said there was no particular virtue in a declaration, and where the Court could do justice upon a notice of motion it never insisted upon proper pleadings being filed. In the case which had been cited, where a trustee sought to recover possession of land, the Court held that

in the same way that he could recover the title deeds he could also recover the land itself from the insolvent who withheld it from his trustee. But there was this advantage in pleadings, that there was a full statement before the Court of what the actual complaint was, and what remedy, which was asked for, could be applied. But in the present case, with this bare notice of motion, it was impossible to say what the complaint really was or what remedy the Court was asked to apply. The notice of motion called upon the respondent to show cause why he should not quit and give up possession of the said property, being the undivided fourteenth part of a share of the said farm. The Court could not order respondents to give up possession of an undivided share. They were told now from the affidavits that they were practically divided shares, but the notice of motion did not say so. It would be quite impossible upon these affidavits to do justice between the parties. A great deal more information was wanted as to how the land had been subdivided, whether lots had been drawn in terms of the will, &c., and the Court thought that applicants should proceed by action. The notice of motion might stand for the summons, so there was no need for a fresh summons. Costs would be costs in the cause.

STEENKAMP V. STEENKAMP'S EXECUTORS.

Mr. Juta moved to make absolute the rule nisi restraining the respondents from mortgaging or alienating a certain farm known as Abyspoort, in the district of Victoria West, the property of the said estate, pending an action for a declaration of rights.

The Court made the rule absolute.

MEYER V. SUHOEMAN AND OTHERS.

Mr. Juta moved for an order interdicting the respondents from subdividing, transferring, or otherwise dealing with a certain portion of the farm Congo, situated in the district of Oudtshoorn, in the estate of the late Matthias J. J. le Roux, pending an action to be brought by applicant for transfer to him of part thereof, with rights attaching to the same.

After hearing Mr. Searle for the respondent,

The Court granted the interdict pending an action to be taken, on condition that plaintiff went to trial in the February term.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 1892.
K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.] Dec. 20th.

REGINA V. HANS VISAGIE.

Contempt of Court—Special Justice of the Peace.

A Special Justice of the Peace has no jurisdiction to punish for contempt of Court.

The Chief Justice said this case had come before him from the Special Justice of the Peace for Laingsburg. The prisoner was charged with having without lawful cause failed to re-enter service after having been specially ordered by the Court to do so. He was charged with the crime of contempt of court, found guilty, and sentenced to pay a fine of £2 or undergo a month's imprisonment with hard labour. In his lordship's opinion the Special Justice of the Peace had no jurisdiction to fine the accused for contempt of court. The 10th section of the Masters and Servants Act of 1856 provided the course to be followed in such a case; the prisoner ought to have been charged with refusal to enter the service of his master, and then he would have been subject to be punished in terms of that section. The Special Justice of the Peace had no jurisdiction to punish the prisoner for contempt of court, and therefore the conviction must be quashed.

STADLER V. MARITZ. { 1892.
Dec. 20th.

Surviving spouse—Executor—Valuation—Impartial appraiser—Sale of assets.

A surviving spouse, who is empowered by the mutual will of herself and her deceased husband to remain in possession of the joint estate during her life, and directed to have the estate fairly valued, is not entitled, because she is the sole executrix, to sell any of the assets before such valuation has been made.

Such a valuation if not fairly made by impartial appraisers will be ordered to be amended upon the application of one of the heirs of the testator.

Mr. Searle, for applicant, moved the Court to

make absolute the rule nisi interdicting the respondent from parting with one-half of the proceeds of the sale of stock and effects in the estate of the late Frans J. Maritz, pending an action for a true statement of affairs and a proper valuation of the assets of the said estate.

This was the return day of a rule nisi granted on the 5th November, which operated as an interdict restraining the respondent from carrying out a sale advertised in *Ons Land* for the 10th November last, pending an action to be instituted by the applicant for a proper valuation and statement showing the inheritance due to applicant's wife from the estate of her late father.

The respondent, by virtue of her marriage in community, was entitled to one-half of the joint estate, and in terms of the mutual will of herself and her husband she was further entitled to a child's portion and to remain in possession of the estate during her lifetime. The estate was, however, to be appraised.

It appeared from the applicant's petition that he was married to his wife in community of property, and that she was a daughter of the respondent and her predeceased husband, Frans Jacobus Maritz, and as such was one of the heirs under his will.

That the respondent had been duly appointed executrix testamentary to the estate of her late husband.

That as such executrix testamentary she had had the estate valued by one Pieter L. Conradie and Pieter U. Stegman, they being her agents.

That the said Conradie and Stegman had undervalued all the assets in the estate, in proof of which deponent alleged that fifteen months ago the said Conradie valued the farm Kitvorstfontein for Divisional Council purposes for the sum of £2,500.

That Conradie now valued the farm Kitvorstfontein for the sum of £1,250, as appeared from the inventory, although landed property had increased about 40 per cent. since the Divisional Council valuation.

Applicant was anxious that proper valuers should be appointed and a proper inventory of the estate made, as he alleged that several articles which belonged to the estate had not been brought up and accounted for.

That he considered the value of the farm to be £2,200, which he had not the slightest doubt would be realised if it were put up to public auction.

In one of the affidavits read a deponent alleged that he was prepared to give for the 800 ewes with lambs 9s. each, instead of 6s., as appeared their value in the inventory, and £20 for a pair of cart horses, instead of £30 for the four horses, which were valued at that figure in the inventory.

The respondent in her affidavit alleged *inter alia* that at the time of her husband's death there

were debts due by the joint estate amounting to £561 2s., which debts she had made herself liable for and taken upon herself to pay, and that there was no cash in the estate.

That her sole object in realising after the appraisal had been made was to enable her to pay off the debts for which she was liable, and that it never was her intention to dispose of the landed property which had not been advertised for sale.

That of the ten heirs under the will, all except applicant and two children of a predeceased heir had agreed to the valuation, and had sanctioned the course adopted by dependent in taking over all the assets appertaining to the joint estate at such valuation.

That deponent had acted *bona fide* in the interests of all concerned.

Mr. Juta having been heard for the respondent, the Court delivered judgment.

The Chief Justice said: If the ground of the application to restrain the sale of the movables had been that the effect of such sale would be to prevent a fair valuation of the assets of the estate, there would have been sufficient justification for an interdict.

But that was not the ground on which the application was based, and the rule actually granted did not restrain the sale, but interdicted the respondent, as executrix of her husband's estate, from parting with more than one-half of the proceeds of the sale. That is a rule which in any case cannot be made absolute. But the evidence certainly discloses sufficient ground for calling upon the respondent to show cause why the valuation made by the appraisers appointed by her shall not be amended.

One of the appraisers was her own agent and auctioneer, who had fifteen months previously appraised the landed property of the estate for Divisional Council purposes at double his present valuation, and the second appraiser was the clerk of the first.

As to the three hundred sheep, a witness is prepared to buy them for nine shillings each instead of six shillings, at which they have been appraised. The surviving testator is empowered by the will to remain in possession of the common estate during her lifetime, but she is also directed to have the assets fairly valued. Such a valuation cannot be regarded as a mere matter of form. It should be made fairly, honestly, and after thorough inquiry, and impartial appraisers should be employed for the purpose.

Prima facie, the valuation actually made in the present case has every appearance of unfairness, and if the effect of it is to curtail the rights of the applicant as one of the heirs, he is not without a remedy.

The Court will grant a rule nisi calling upon the

respondent to show cause on the first day of next term why the valuation of the farm shall not be increased to £2,000 and that of the sheep to £185. The question of costs will stand over.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinne; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

VAN DER WESTHUIZEN V. LUYT.—{ 1892.
IN THE INSOLVENT ESTATE OF { Dec. 20th.
JOHAN C. WINTERBACH.

Insolvency — Life policies — Pledge — Improper arrangement — Trustee — Tainted evidence.

Mr. Juta moved for an order requiring Gabriel J. Luyt, a creditor in the said estate, to deliver up to the trustee certain two policies of life insurance pledged to him by the said Winterbach, in order that they may be sold, and the proceeds applied in reduction of the liabilities of the estate in their due order of preference.

Mr. Searle appeared for the respondent.

It appeared from the petition of Mr. Nicolaas Jacobus van der Westhuizen that the insolvent's estate was compulsorily sequestrated on the 29th November, 1888, on the petition of the manager of the Standard Bank, Ceres.

That on the 2nd June, 1885, the insolvent passed a general mortgage bond for £250 to Gabriel Jacobus Luyt, whereby he specially pledged certain two life policies on his life in the South African Mutual for the sum of £750 and £250 respectively.

That on the 21st December, 1888, the aforesaid Luyt was appointed sole trustee of the said estate.

That a liquidation account in the said estate was duly filed and confirmed on 27th September, 1889.

That petitioner was a creditor in the estate to the extent of £1,230 17s. 3d., being the balance of a certain bond passed by insolvent in his favour, dated 12th May, 1876 (after deducting the amount of dividend awarded, £292 11s. 6d.).

That the said Luyt had failed and neglected to bring up these two policies as an asset in the estate, and made no mention whatever of same in his report, neither did he prove the general bond under which they had been pledged.

That the only reference to the said policies which petitioner could trace appeared in the account current attached to the proof of debt filed by the respondent (for the sum of £72 18s. 6d., in which the advance of £290 made therein, and for which the general bond was passed, appeared to the debit of the insolvent in July, 1885, and that the insolvent was credited in January, 1888, by life policies £250).

That the surrender value of the policies at the date of sequestration was about £280, and the present value £322 10s., but that they would fetch a much larger sum at public auction.

That any surplus after paying the said general bond and interest, and the necessary expenses incurred therein, should go to petitioner in virtue of the general clause in his bond.

The petitioner prayed the Court to order the respondent as trustee to cause the said policies to be sold at public auction, and to award the proceeds thereof according to the legal order of preference, after deducting the necessary expenses.

The respondent, in his answering affidavit, alleged *inter alia* that the policies in question were ceded to him by the insolvent as security for a debt due to him in 1885, and that the cession was duly registered.

That the debt was then £200 for money lent, upon which interest accumulated to the amount of between £80 and £40, and that respondent paid on the said policies as premiums £86 12s. 4d.

That in January, 1888, respondent took over the policies from Winterbach, and credited him in account with £250 as the fair value of the same at that time.

That besides the said proof of debt, deponent proved on a mortgage bond for £600, upon which there was a deficiency of £400.

That when proceedings were taken by the Standard Bank against the said Winterbach, deponent spoke to the insolvent and told him that the bank would not probably force him to surrender, and he then offered to the said Winterbach, if he would consent thereto, to restore the policies to Winterbach's name, and merely to hold them as security, as they were in the first instance held, and treat them as an asset in the estate subject to the deponent's lien, but the said Winterbach insisted upon deponent adhering to his bargain, and taking over the said policies at the price agreed upon between them.

That the said Winterbach had not mentioned the said policies as an asset in his schedules, nor had he brought up the debt for which the policies were pledged as a liability.

That the said Winterbach himself drew up the proof of debt showing the credit of £250 in respect of the policies aforesaid, and showing the balance of £72 18s. 6d. due to the said Luyt, the said proof of debt being in the handwriting of the said Winterbach.

The insolvent (Winterbach) also filed an affidavit, in which he denied many of the statements made by his trustee, and specially alleged that a few days after his estate had been sequestrated he saw the respondent on the subject; that the respondent was anxious to get himself elected as trustee, and inquired from deponent who his creditors were.

That deponent then for the first time spoke to respondent about the life policies held by him as security for his bond of £200.

That a mutual agreement was then arrived at by respondent and deponent that the latter was not to bring the policies into his schedules, and that respondent was not to prove his bond on the estate for £200, respondent promising deponent to hold the policies under security of his bond for and as belonging to deponent, seeing that the respondent would get no more out of the estate than the £200 if he should prove his bond; respondent further promising deponent to deliver to him the said policies at any time he might be desirous to have them back, and being in a position to pay him the £200; deponent also promising to get respondent the votes of his father-in-law and of his mother, creditors in the estate, to get him (respondent) elected trustee, in order that he might be to some extent benefited by the commission for any loss which he might have sustained as a creditor.

Counsel having been heard,

The Chief Justice said: The application must be refused. The application relied entirely upon tainted evidence. The only witness produced to show that this was not a sale admitted that he was a party to an improper arrangement—an arrangement which had it been brought before the notice of the Court would have prevented him from getting his rehabilitation. He ought to have made a full and fair surrender, and he ought never to have had his rehabilitation. The evidence was so tainted that the Court could give it no credence, and the application would be refused with costs.

[Applicant's Attorney, H. P. du Prees; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

CADLEY V. CADLEY. { 1892.
Dec. 20th.

Pauper—Process—Publication—Practice.

Leave given to publish a brief notice of process instead of the ordinary citation and intedit.

Mr. Graham moved for further consideration of the order as to publication of the process and notices in the suit authorised to be instituted by applicant *in forma pauperis* against her husband for restitution of conjugal rights, failing which for divorce.

Leave had been given plaintiff to sue by edict, the intedit to be served with the citation, and two publications to be made in the *London Daily Telegraph* and in the *Gazette*.

Plaintiff, who was in humble circumstances and

unable to pay the cost of publication, amounting to £18, now asked that a further order should be made as to publication.

The Court authorised a brief notice of the process to be inserted in the *Gazette* and in a London paper, the notice to be submitted to the Registrar for his approval before it was published.

IN THE ESTATE OF THE LATE ANDRIES
VENTER.

Mr. Tredgold moved for leave to the executrix to mortgage the landed property in the estate for the purpose of discharging the debts thereof, the stock and movable assets being insufficient for the purpose, and it being moreover to the benefit of the minor children that the executrix should be allowed to retain the live-stock and loose assets for the carrying on of the farming business.

The Court granted the necessary leave.

GROENEWALD V. GROENEWALD.

Mr. Molteno applied to have the rule nisi in this matter made absolute for leave to sue in *forma pauperis*.

The Chief Justice said the Registrar had received a telegram from the defendant stating that his wife had refused to return to him, and offering to provide means to enable her to return.

The Court made the rule absolute, but left it to counsel as to whether the case should be proceeded with or not.

REGINA V. POPPE. } 1892.
} Dec. 20th.

Importer's licence—Construction of statute—
Act 38 of 1887.

A person importing annually upwards of £1,200 worth of tins for the sole purpose of using them to hold cured lobsters for export to another country is not liable to an importer's licence in terms of Act 38 of 1887.

This was an appeal from a sentence passed upon the appellant by the Assistant Resident Magistrate of Cape Town.

The appellant was charged "with wrongfully and unlawfully contravening section 6 of Act 18 of 1870 and section 2 of Act 88 of 1887, by carrying on the trade or business of an importer without having taken out the particular licence in that behalf required, in that he did on behalf and in the name of the South Atlantic Lobster Syndicate, at the port of Cape Town, import goods, to wit, tinware, &c., other than the produce of South Africa, for the purpose of trade or barter during

the year 1892, the value of such importations exceeding £1,200 sterling, the said South Atlantic Lobster Syndicate not having taken out an importer's licence."

The accused, who pleaded not guilty, gave the following evidence at the trial:

I am the accused, and am manager of the South Atlantic Lobster Syndicate. We have sold none of our products in the Colony. The imports of tins, solder, and machinery are for the purposes of manufacture. The syndicate was founded in February, 1891. Approximately we have imported in 1891 about £500 worth and some thousands in 1892. The tins are imported for the purpose of making the lobsters saleable. They are imported for the purpose of our trade with France, but not in the Colony.

The accused was found guilty and sentenced to pay a fine of 5s.

The Acting Resident Magistrate delivered the following judgment: In this case the defendant does not deny that he is the proper party to be sued, and that the company he represents imported goods to the value of over £1,200 in 1892. The goods of this value imported in 1892 are chiefly tins, solder, india-rubber, &c., used for the packing of lobsters, which are sold in France, and not in the Colony. Now the only definition we find of the term "imports" is that laid down by Act 88 of 1887, section 8, which states that an importer means any person who imports goods to the value of £1,200 or upwards for the purpose of trade or barter, such goods not being the produce of South Africa. The real question in this case seems to devolve merely on the interpretation of the definition in the Act of the term "importer." In interpreting the law, one must note, *inter alia*: (1) previous decisions in the matter, (2) usage, and (3) the intention of the Legislature, &c. In this case, unfortunately, we have little or nothing to guide us, and the words must therefore be taken as we find them, *vis*, in a restrictive sense, and I think any extensive interpretation must be avoided. The defendant in his evidence states that these tins, &c., forming the dispute under consideration, are imported for the purpose of their trade in France, but not in the Colony. The definition quoted makes no distinction as to the place where the trading is to take place, whether in the Colony or not, although one would at first sight imagine that trading in the Colony only was intended, and that seems to be the case mainly on which the defence relies. After due deliberation, I have come to the conclusion that whereas the company import these tins, &c., to the extent mentioned, it is evident they find it beneficial to their trade to import rather than to purchase them in the Colony, and hence, in my opinion, it falls under the definition of importing them for their trade, regardless of the place where the trade is being

actually carried on; and as the lobsters are caught, prepared, and canned here, a part of their trade is also carried on here, notwithstanding that they do not sell here. The prosecution is desirous, I presume, merely for a decision in this matter, and hence a nominal penalty of five shillings would meet the case, thereby allowing the defendant, should he be so advised, to appeal to a higher Court.

The defendant now appealed.

Mr. Juta was heard in support of the appeal, and contended that, as the appellant's company traded in lobsters, and not in tins, the Act did not apply. The tins were not imported for the purpose of trade or barter, nor were the company importers within section 8 of the Act. The policy of the Legislature was to encourage Colonial industries.

The Attorney-General, for the Crown, urged that while the Legislature was anxious to encourage Colonial industries, the Court must in the present case look clearly at the definition of importer in the Act of 1887. An importer was any person who imported any goods other than the produce of South Africa for the purpose of trade or barter. These tins were imported to be sold. The lobsters could not go to France without the tins. The tins were either sold or given away. It was against common sense to say that the company was giving away these tins for nothing. Anything for which money was obtained was trade. Barter was trade. And in this instance the company must recoup themselves for the expenditure on the tins. It was not necessary to make a profit on the tins; they were used for the purposes of trade, and they were sold.

The Chief Justice, in delivering judgment, said: The third section of Act 88 of 1887 defines an "importer" to mean "every person who imports any goods other than the produce of South Africa for the purpose of trade or barter, provided that such importation shall be of the value of at least £1,200 during the year." By the second schedule to the Act the charge for an importer's licence is fixed at £12 over and above any other licence that he may hold. The licence would not be required from a person who imports goods for his own private purposes. The importation must be for the purpose of trade or barter, and by this I understand that it must be for the purpose of trading in or bartering the goods so imported. Machinery, for instance, which is imported, not for the purpose of resale, but for the purpose of being used in manufacture, might be imported without an importer's licence. The appellant has imported upwards of £1,200 worth of tins, which he has used for the purpose of canning lobsters for export to France, and the Magistrate of Cape Town has held that he is liable to an importer's licence. It is not alleged that the tins are

capable of being used for any other purposes than as receptacles for the cured lobsters. They were imported for that special purpose, and no other. They were not sold again as tins, but after they had been filled, the contents were sold as cured lobsters. There appears to me to be no difference in principle between the present case and the one which has been used as an illustration during the argument, namely, that of a person importing labels for the purpose of affixing them to articles manufactured in this colony. They may cost the manufacturer more than £1,200, but they have no pecuniary value for anyone else. Their sole use consists in indicating the nature of the articles to which they are affixed, but these articles are none the more valuable because of the labels. The sole purpose of the tins is to render the lobsters fit for transport and handling in sales. It would certainly be a more than liberal construction of the Act to hold that under such circumstances the tins have been imported for the purpose of trade or barter. The Act, creating as it does a pecuniary burden, should in case of doubt receive a strict rather than a liberal construction. But I entertain no doubt as to the real intention of the Legislature. The Magistrate, in my opinion, erred in fining the appellant, and the appeal must therefore be allowed.

[Attorneys for the Appellant, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, { 1892.
K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.} Dec. 21st.]

DALE V. WINSHIP.

Resident Magistrate—Jurisdiction—Set-off compensation—Unliquidated damages—Counter-claim.

In an action brought in a Magistrate's Court for an amount within his jurisdiction the defendant filed two distinct counter-claims founded on distinct causes of action, the first being for £20 as unliquidated damages, and the second for £100, likewise as unliquidated damages.

Held, (1) affirming *Scott v. Barnard*, that the Magistrate had jurisdiction to try the first counter-claim as well as the plaintiff's claim, and (2) affirming *Smith v. Rame-*

botham, that the second counter-claim, although in excess of his jurisdiction, did not justify him in refusing to try the plaintiff's claim.

This was an appeal from a decision of the Assistant Resident Magistrate for Queen's Town in an action in which the appellant (plaintiff in the Court below) sued the respondent (defendant) for £16, rent of a mill and machinery, and also for ejectment. The defendant excepted to the summons on the grounds:

1. That there was no cause of action shown in the first count of the summons, there being no allegation of occupation by the defendant, nor that the plaintiff had any right of action, and that there was no cause of action set forth in the second paragraph of the summons, a mere letting being alleged of a mill and machinery. Defendant being prejudiced and unable to plead, prayed the dismissal of the summons with costs.

2. That the plaintiff's claim of £16 for rent and his prayer for ejectment are beyond the jurisdiction of the Court, the defendant's right to the occupation of the mill, machinery, and house premises being to him of the value of £40 and upwards, and therefore the Court had no jurisdiction.

3. That the plaintiff had split his claim, which exceeded £20, and that therefore the Court had no jurisdiction.

On the exceptions being put in, the plaintiff withdrew that portion of the summons regarding the ejectment, leaving merely the claim for rent, £16.

The defendant thereupon withdrew the second exception.

The case was then adjourned from the 10th to the 14th November, 1892.

At the second hearing of the case (14th November), the first exception was disallowed, and also the third exception, unless the defendant's attorney had evidence to prove that the portion of the account split from the claim for rent was connected in some way with the latter on the authority of "*Brett v. Soliman*" (4 Juta, p. 9).

Evidence having been led, the third exception was overruled.

Defendant then pleaded:

1. The whole subject matter of his second and third exceptions, and prayed for judgment with costs or otherwise that the plaintiff's summons might be dismissed with costs.

2. The general issue.

3. In case the above be deemed insufficient, but not otherwise, the defendant says that owing to certain representations made to him by plaintiff he (defendant) was induced to hire a certain mill

and machinery and house, the property of the plaintiff, at the sum of £8 per month, terminable on six months' notice on either side, and that owing to such representations defendant gave up a situation at Port Elizabeth of the value of £15 per month, and on the 2nd September, 1892, he took possession.

That thereafter defendant found that the plaintiff had falsely misrepresented the said mill and machinery, and the capacity and profits thereof. Defendant has suffered loss and damage during the said term of two months in a sum exceeding £20, after giving plaintiff credit for the rent or sum of £16 claimed in the summons, of all which defendant has made up an account hereunto annexed, the details of which he prays may be considered as if inserted herein.

Defendant prays for judgment against the plaintiff for the sum of £20, with costs of suit.

Defendant further pleads and says that after the adjournment of the Court on Thursday, 10th November, the plaintiff did by himself, and with his sons and others him assisting, forcibly and violently break into and enter the said mill premises, and did maliciously destroy and injure certain property, and did attempt to remove the mill engine, displacing same and removing a portion thereof, and did violently assault defendant and his wife, and other wrongs and injuries he then and there did to defendant to his damage in the sum of £100, which sum over and above that firstly pleaded the defendant claims from the plaintiff, and says that plaintiff's case should be dismissed by the Court for want of jurisdiction.

The plaintiff's attorney objected to the last plea on the ground that the damages therein alleged had been sustained since the adjournment of the case on the 10th November.

This objection was overruled, as defendant's attorney had not on the 10th November yet been called upon to plead.

The plaintiff then excepted to the defendant's claim in reconvention on the following grounds:

1. That the claim is one for damages which are uncertain, and can be only ascertained upon actual proof of all the facts as therein set forth.

2. That plaintiff has another claim pending against the defendant for certain coal used by him, grain bags, tar, tools, and damage to the mill and machinery, caused by the improper wear and tear, the result of his (the defendant's) incompetency as a miller, and want of knowledge of the engine and machinery generally.

Wherefore plaintiff prays that the claim in reconvention may be dismissed with costs.

These exceptions were disallowed; the defendant's attorney to lead evidence to prove the *bona fides* of the claim in reconvention ("*De Jager v. De Jager*," 8 Juta, 69; "*Brady v. Michiel*," 8 Juta, 178; "*Randall v. Pote*," 5 E.D.C., 88).

The defendant then gave evidence as to the damages claimed by him; plaintiff's attorney, however, not being allowed to cross-examine.

The Magistrate then declined to go further with the case, being satisfied as to the *bona fides* of the defendant's claim in reconvention, which was beyond the jurisdiction of the Court, and for that reason dismissed the plaintiff's claim with costs.

The plaintiff now appealed.

Mr. Searle was heard in support of the appeal and contended that the plaintiff's claim was for rent, and was liquidated, and within the Resident Magistrate's jurisdiction. Defendant was not entitled to set up in reconvention any claim for unliquidated damages, "*Smith v. Ramsbotham*" (Buch., 1878, p. 98), beyond the Magistrate's jurisdiction. As to defendant's first claim in reconvention, that being for £20, although unliquidated damages, could be considered by the Magistrate and fully entered into—"Scott v. Barnard" (2 C.T.L.R., 256). But the Magistrate was wrong in holding that the second claim of £100 for unliquidated damages could, however *bona fide* it might be, oust the Resident Magistrate's jurisdiction in the claim in convention. The cases of "*De Jager*" (8 Juta, 69) and "*Brady v. Michiel*" (8 Juta, 178) referred to a different state of things; to wit, where a claim in reconvention, illiquid but capable of being liquidated, and therefore capable of being "opposed in compensation," had been set up, these cases decided that in such an event the Magistrate should go into the question of the *bona fides* of the claim, and if it was a *bona fide* one should dismiss the whole suit as beyond his jurisdiction. The principles upon which such compensation or set-off can be allowed are fully set forth in "*Kruger v. Van Vuuren*" (5 Juta, 162). The only possible distinction that can be drawn between "*Smith v. Ramsbotham*" and the present case is that in the former there was a written document, here a verbal agreement of lease. But in "*Brett v. Soliman*" (4 Juta, 6), the same principles as in *Smith's* case were applied, the plaintiff's claim being upon a lease merely verbal as in the present case.

Mr. Meltano, for the respondent, referred to Act 20 of 1856, section 8, paragraph 4, and Act 43 of 1885, section 6, paragraph (b).

The claim pleaded in opposition need not be liquid. "*De Jager v. De Jager*" laid down the rule generally, followed by "*Brady v. Michiel*," "*Brett v. Soliman*," and finally "*Randall v. Pote*" (5 E.D.C., 88). In the last case the claim in reconvention was illiquid. When the amount was found to be *bona fide*, the claim in convention would be diminished *pro tanto*. The principle is to be found in "*Vowe v. Pedder*" (1 Menz., p. 88), the extension of the principle in "*Scott v. Barnard*" (2 C.T.L.R., 256).

The Chief Justice said: It would be a waste of time to explain the cases of "*De Jager v. De Jager*" and "*Brady v. Michiel*," as they have been so frequently explained of late. It is perhaps to be regretted that my remarks in those cases were somewhat brief and perhaps open to misconstruction, but a careful perusal must show that they were intended to apply only to counter-claims which could be pleaded by way of compensation.

At the time when those cases were argued the Reports containing the case of "*Smith v. Ramsbotham*" (8 Buch., 98) had not yet been published. It is clear from this case that the Court had already decided that a magistrate should try a claim in convention within his jurisdiction even where there is a counter-claim for unliquidated damages for an amount exceeding his jurisdiction. In the still earlier case of "*Smith v. Morum Brothers*" (7 Buch., 20) the Court had decided that a magistrate was justified in treating a counter-claim which was in excess of his jurisdiction, but which was capable of being pleaded in compensation, as a set-off against the plaintiff's claim. And where, as in the recent case of "*Scott v. Barnard*," the counter-claim is for unliquidated damages, but for an amount within the Magistrate's jurisdiction, the Court has held that he should try the counter-claim as well as the claim. In accordance with this last case, I am of opinion that the Court below ought to have tried the first counter-claim, as being for an amount within his jurisdiction, and being perfectly distinct from the second counter-claim. The fact, however, that the second counter-claim exceeded his jurisdiction ought not to have deterred him from trying the claim in convention. The second counter-claim was for unliquidated damages, and, according to the decision in "*Smith v. Ramsbotham*," the Magistrate ought to have tried the claim in convention, leaving the defendant to his ordinary remedy for damages in a competent Court. The appeal will therefore be allowed with costs in this Court, and the case will be remitted to the Resident Magistrate to try the claim in convention, and the first claim in reconvention, and to decide the question as to costs in the Court below.

[Appellant's Attorney, John Ayliff; Respondent's Attorneys, Messrs. Van Zyl & Buissinne.]

FRAUSTAEDTER V. SAUER. { 1892.
Dec. 21st.

Account—Tender—Waiver—Costs.

In an action brought by a tradesman for goods sold and delivered, it was proved that the defendants had never objected to pay for such goods as they had themselves bought, but that their sole objection was to pay for

goods which had been ordered in their name, and without their authority, by someone else.

It was also proved that the plaintiff had by his conduct led the defendants to believe that no tender short of the full amount would be accepted.

Held, that, although there was no formal tender of a definite sum as the price of the goods supplied to the defendants, the Magistrate, in giving judgment for such price, was justified in ordering the plaintiff to pay the costs.

This was an appeal from a decision of the Resident Magistrate for Wynberg in an action in which the appellant (plaintiff in the Court below) sued Mrs. Susan Sauer and Miss Heloise Sauer for the sum of £6 19s. 9d., balance of account alleged to be due by the defendants to the plaintiff for goods sold and delivered.

The second-named defendant denied the debt, and the first defendant pleaded that no specified account had been rendered, and that a tender had been made for what was owing. The following evidence was, *inter alia*, given at the trial :

Mr. John L. Lemue, sworn, stated : I am clerk to Mr. Sauer, in Cape Town. I was sent out to plaintiff about the account in question. I told him I came to pay Mrs. Sauer's account. I said, Mrs. Sauer does not owe all this account. I offered to pay whatever Mrs. Sauer owed. I asked him for Mrs. Sauer's account, but he said he would not give a separate one, as it was mixed up with Miss Hislop's. I was ready to pay whatever Mrs. Sauer owed.

Cross-examined : I admitted 14s. I offered to pay £8 6s. 6d. after that, as I thought that was the right amount, or anything more that Mrs. Sauer owed. I had between £2 and £8 with me to pay the account, as I thought that would be sufficient.

From other evidence given it appeared pretty clear that some of the goods, which were debited to the defendants, had been supplied to a Miss Hislop who, some months before the date of the action, had been on a visit with Mrs. Sauer.

The Magistrate dismissed the case against Miss Sauer with costs, and gave judgment for plaintiff against Mrs. Sauer for £4 18s., the amount admitted by her to be due to the plaintiff, the latter to pay all costs.

From this judgment the plaintiff now appealed.

Mr. Juta was heard in support of the appeal, and contended that as no definite amount had

been tendered, the judgment in plaintiff's favour should have carried costs.

Mr. Searle, for the respondents, was not called upon.

The Chief Justice said : The Magistrate has found as a fact that part of the goods, for the price of which the defendants were sued, had been brought by and for a Miss Hislop. If his finding was correct, and the plaintiff's counsel has not attempted to impeach it, then it clearly was the duty of the plaintiff to keep Miss Hislop's account distinct from that of the defendants.

Instead of that, the plaintiff lumped all the items together, and sent the account to the defendants. The question might arise, but it does not require decision, whether the defendants were bound to tender any sum to the plaintiff, whose duty as a tradesman it was to furnish them with a correct account of goods sold to them. In fact the defendants have all along expressed their readiness to pay for the goods which they had themselves bought. They did not know the exact amount, but there can be no doubt whatever that if the plaintiff had been willing to accept the amount for which he has obtained judgment, the defendants would have been quite ready and willing to pay it. Now supposing the plaintiff had said in so many words, "You need not trouble yourselves about tendering any sum short of the whole amount, for nothing less will be accepted," it would be obvious that a formal tender was dispensed with. Although these words were not actually used, the plaintiff's whole conduct amounted to a waiver or renunciation of his right to insist upon a tender of the amount found to be actually due. The Magistrate, in giving judgment in favour of the plaintiff for £4 18s., ordered him to pay the costs. It is this part of the order that is appealed against, but in my opinion the appeal must be dismissed with costs.

[Applicant's Attorney, P. M. Brink ; Respondents' Attorney, J. W. Sauer.]

LOGAN V. READ AND ASH. { 1892.
Dec. 21st.

Declaration — Exception — Principal and agent.

The bare fact that a person has borrowed money as agent for a disclosed principal does not render such agent liable as principal, and therefore, where a declaration alleged in substance that the plaintiff had lent money to the defendants in their capacity as agents of a third party, and claimed the amount from the defendants personally,

Held, that such declaration disclosed no cause of action against them in their individual capacity.

Mr. Searle and Mr. Sheil appeared for the plaintiff, and Mr. Juta for the defendants.

This case came on for argument upon an exception taken to the second paragraph of the declaration, which was in the following terms:

2. In or about the month of January, 1892, the plaintiff lent to the defendants, in their respective capacities as captain and secretary of the "English Cricket Team," and as such the representatives, managers, and administrators of the said team, and at their special instance and request, the sum of £750.

The defendants excepted to the declaration on the grounds that it disclosed no cause of action against them, and therefore prayed that the plaintiff's claim might be dismissed, with costs.

Mr. Juta was heard in support of the exception.

Mr. Searle, for the plaintiff: The words captain and secretary of the English cricket team are purely descriptive. It was because the defendants occupied those positions that the money was lent to them. We are willing that these words should now be expunged.

The Chief Justice said: The objection to the declaration appears to me to be a good one. The declaration alleges, in substance, that the defendants, as agents of "The English Cricket Team" had borrowed £750 from the plaintiff and the claim for this amount is made against the defendants personally. There are certainly cases in which persons contracting as agents have been held liable as principals, but they are exceptions to the general rule. The declaration contains no statement which would bring the present case within any of those exceptions. The bare fact that a person has borrowed money as an agent for a disclosed principal does not render him liable as a principal. The exception to the declaration will therefore be allowed with costs, but the plaintiff will be at liberty to amend his declaration by striking out the allegation that the defendants borrowed the money as agents.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinne; Defendants' Attorneys, Messrs. Fairbridge & Arderne.]

In re CAPE CENTRAL RAILWAY COMPANY.

Mr. Searle moved for the confirmation of the third report of the liquidators.

The Court confirmed the report.

SUPREME COURT.

(IN CHAMBERS).

[Before Sir J. H. DE VILLIERS,
K.C.M.G. (Chief Justice), Mr. } 1892.
Justice BUCHANAN, and Mr. } Dec. 28th.
Justice UPINGTON, K.C.M.G.]

IN THE ESTATE OF THE LATE WM. QUIN.

Mr. McLachlan moved for authority to the executors of the above estate to raise a loan of £150 for the purpose of meeting a deficiency in the estate, and also to provide a sum of £60 for repairs and alterations to one of the houses.

By the mutual will of deceased and his surviving spouse, one half of the income to be derived from the landed property and the investments of the movable assets was to be paid to the survivor, and the other half was to be applied towards the support of such of the testator's children as the executors might consider to be deserving thereof. In 1886 a loan of £800 was raised in order to pay debts of the estate under authority of the Court. This loan was paid off in 1890, mainly out of the proceeds of the sale of some of the landed property and partly out of another loan of £450, which was then sanctioned by the Court.

All the testator's children are now major.

According to the last administration and distribution account filed by the executors, there was a deficiency of £88 6s. 4d, and they now applied for authority to raise a sum of £150 in order to meet this deficiency and also to provide a sum of £60 for repairs and alterations to one of the houses.

The petitioners alleged that if these repairs and alterations were effected, the rent derived from this house would be increased by £80 per annum, and the Master reported that it would be for the benefit of the estate that it should be done.

That the income of the estate during 1891 was £128, and the future annual income might therefore be estimated at about £150 if the application were granted.

The Master suggested for the consideration of the Court that if the petition were acceded to, it should be on condition that the bond be reduced by annual payments of £80.

The Court granted the application on condition that the bond should be reduced by annual payments of £80.

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Held, that the plaintiffs were entitled to terminate the agreement by giving twelve months' notice provided they supplied the water for the defined period of five years at least.	
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<i>The plaintiff, having been injured by reason of a horse driven by him putting its foot into a hole caused by the improper filling up of the excavation, sued the defendant for damages.</i>	
<i>Held, that inasmuch as the Municipal regulations required that the work should be done under the supervision and to the satisfaction of the City Engineer, the defendant, who employed a competent contractor to do the work in accordance with such regulations, was not liable in damages.</i>	
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<i>Held, that although the original transfer deed of the property includes land P. as being part of the estate O., the intention of the Act was to confine the defendant's rights to that part which is situated in Table Valley.</i>	
<i>Held further, that if the Act itself is not sufficient to enable the Court to identify the property, extrinsic evidence is admissible of every material fact which will enable the Court to identify the "estate O." to which the Act refers.</i>	
<i>Held further, that if such extrinsic evidence has shown that the description in the Act is alike applicable to two properties, declarations of the parties to the deed of submission and award, to which the Act of Parliament gave a legislative sanction, are admissible to solve the latent ambiguity.</i>	
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<i>Executors testamentary (who had also been appointed administrators of the testator's estate with directions as to the investment of the residue for the benefit of certain minors during their minority) having died, executors dative were appointed by the Master.</i>		had stood by, and without protest had allowed the land to be sold in execution of a judgment, the Court held that the purchasers of the land in question were not to be prejudiced by any latent rights held by the bona-fide possessor but of which they (the purchasers) had had no notice.	
Held, that such executors dative, by their acceptance of the trust, also became administrators of the estate and that, after having liquidated the estate as executors, they were entitled in their capacity as administrators, to invest the residue in the manner directed by the testator.		<i>Per De Villiers, C.J.—Under our system of registration a right by prescription does not vest the ownership itself in the person who has acquired that right, it rests with him to complete his title by registration.</i>	
Held further, that the Master could not compel them to pay the residue into the Guardians' Fund.		<i>It still continues an entirely latent right, and in my opinion the holder has no greater right than for instance a fidei-commissary heir who has a tacit hypothec on the property.</i>	
Held also, that the sureties for the executors dative incurred no liability in respect of the performance by the latter of their duties as administrators after they had finally liquidated the estate as executors.		<i>Until he has completed his title by registration he has a mere right to ownership and not the ownership itself.</i>	
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<i>In re Best 377</i>		Fire—Insurance—Misrepresentation—Proposal—Agent.	
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7. ——— Ordinance 6 of 1843, sections 38—41.	
<i>At a second meeting of creditors O., representing a majority in value but not in number over £30, proposed himself as trustee. L. was proposed by an attorney representing a majority in number.</i>	
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Judgment — Attachment — Moneys — Magistrate's Court writ.		<i>A sale is not "in bottles" in terms of the 7th section of Act 28 of 1883, unless the liquor was in the bottle at the time</i>	
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<i>of the sale and was delivered to the purchaser in such bottle.</i>	
<i>The appellant, holder of a bottle licence, supplied a customer by measuring brandy in a bottle and pouring the contents into a tin "canteen" of the purchaser, who then paid for the brandy.</i>	
<i>Held, that the appellant was properly convicted of a contravention of the 3rd sub-section of the seventh section of the Act.</i>	
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2. ——— Permitting drunkenness—Sale to child—Condition—Sale to natives.	
<i>On a charge against the holder of a liquor licence for permitting drunkenness or violent conduct upon his premises it is no valid defence that he was too busy attending to other customers.</i>	
<i>It is the duty of licensed persons to avail themselves of the powers given to them by the 78th section of Act 28 of 1883 for the prevention of such conduct.</i>	
<i>Where it is clearly proved that the parent of a child under fifteen had sent such child to buy liquor from a licensed person and that the child bought the liquor for its parent.</i>	
<i>Held, that such licensed person cannot be convicted of selling to such child in contravention of the 6th sub-section of the 73rd section.</i>	
<i>Held further, that the burthen of proving that liquor delivered to such a child was really sold to some other person to whom it is lawful to sell lies upon the person so delivering the liquor.</i>	
<i>It is not within the competence of the Licensing Court under the Act 28 of 1883 to insert into any retail licence authorising the sale of liquor between certain hours a condition having the effect of prohibiting the sale of liquor to natives between those hours.</i>	
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<i>A party noting an appeal to a Superior Court against a judgment of a Magistrate's Court should prosecute his appeal within a reasonable time, failing which the opposite party is entitled to an order barring further proceedings in such appeal.</i>	
<i>It is no excuse for delay on the part of the appellant that the successful party did not obtain a direction from the Magistrate in terms of the 33rd section of Act 20 of 1856, either as to the execution or as to the suspension of the judgment.</i>	
<i>A delay on the part of a defendant from July, 1891, to December, 1892, held so unreasonable as to entitle the plaintiff, who had obtained judgment in his favour, to an order debarring the appellant from proceeding with his appeal.</i>	
<i>An appeal should be set down for hearing for as early a date after the expiration of fourteen days from the noting of the appeal as is compatible with the state of business in the Superior Court.</i>	
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—Compensation—Liquid and illiquid claims—Unliquidated damages.	
<i>In an action upon a promissory note for £15 in a Magistrate's Court the defendant admitted the debt and claimed in reconvention the sum of £20 as unliquidated damages for the plaintiff's breach of contract.</i>	
Held, that the Magistrate had jurisdiction to try the counter-claim.	
The cases of <i>Smith v. Ramsbotham</i> (Buch., 1878, 98), <i>De Jager v. De Jager</i> (3 Juta, 69) and <i>Brady v. Michiel</i> (3 Juta, 178) distinguished.	
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Abandonment of part of claim.	
<i>A plaintiff assuming that £157 was owing to him by the defendant for goods sold and delivered, reduced the amount to £100 in order to bring the case within the Magistrate's jurisdiction, and sued for that amount in the Magistrate's Court. The Magistrate, although not satisfied that a plea of payment of £93 could be sustained, suggested to the plaintiff that he should be content with £64 and, upon the plaintiff assenting, judgment was given for that amount.</i>	
Held, on appeal, that, as it lay upon the defendant to prove his plea and as he had failed to do so, the judgment should not be disturbed.	
<i>Semble, that inasmuch as the payment of £93, if made, would have reduced the original debt of £157 to £64, and inasmuch as the Magistrate's Court had jurisdiction to decide upon a claim for this latter amount although it originally formed part of a debt beyond his jurisdiction, the fact that the plaintiff had reduced his claim to £100 upon the assumption that £93 had not been paid, would not debar him from recovering more than the difference between £100 and £93.</i>	
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<i>The Court granted an order directing the Registrar of Deeds to pass transfer of land on a power signed by a woman married by ante-nuptial contract, the marital power not being excluded, and unassisted by her husband, the latter having received notice of the application and not appearing to oppose.</i>	
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<i>Schoombie v. Schoombie's Trustees</i> (5 Juta, 189) followed.	
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Master of the Supreme Court.	
<i>The plaintiff's mother died intestate without having appointed anyone to administer the maternal inheritance of her minor children.</i>	
<i>The defendant and the plaintiff's father</i>	

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<i>were appointed executors dative and an account of their administration was duly lodged with and accepted by the Chief Magistrate of Griqualand East, but the amount of the plaintiff's inheritance was in good faith allowed by the defendant to be retained by the plaintiff's father as natural guardian.</i>	
<i>Held, that the plaintiff, on becoming of age, was not entitled to recover the amount of his maternal inheritance from the defendant.</i>	
<i>The proper course for an executor under a will to which tutors or trustees are appointed to a minor during the lifetime of his father is to offer to pay the amount of the bequest or inheritance of the minor to such tutors or trustees upon their taking out letters of confirmation as curators nominate.</i>	
<i>If they refuse or are unable to act he may apply to the Court for the appointment of one or more curators or trustees or he may pay the money into the Guardians' Fund, but it would not be safe to pay the money to the father.</i>	
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Municipality — Bye-law — Natives — <i>Ultra vires</i> .	
<i>By Act 23 of 1880 the East London Municipal Council is empowered to frame such bye-laws "as may seem meet for the good rule and government of the Municipality." The Council having made a bye-law that "the Council shall at any time have the right to take away all sticks from natives when it may think fit to do so."</i>	
<i>Held, affirming the decision of the Eastern Districts Court, that the Act did not warrant a bye-law by which a stick could be forcibly taken away and detained from a native from whom no danger was apprehended and that the plaintiff, a native, from whom a stick had, by authority of the Council, been taken away whilst peaceably employed within the Municipality, was entitled to recover the stick or its value.</i>	
<i>Semble, that inasmuch as it had been proved that there were large numbers of aboriginal natives in East London who could not, without danger to the good government of the town, be</i>	

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<i>allowed aimlessly to carry about sticks, there would be no valid objection to a bye-law which authorises a fine upon any aboriginal native carrying a stick except for what the Court should find to be necessary purposes, or even to a bye-law which authorises the taking from such native of any stick carried under circumstances that might lead to the apprehension of danger to the good government of the Municipality.</i>		Verdict—Culpable homicide—Point reserved.	
<i>In the latter case, however, the stick, unless legally forfeited by judgment of the Court, would have to be returned when the danger is past.</i>		<i>A prisoner indicted for murder under the Native Territories Penal Code may be convicted of culpable homicide.</i>	
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<i>Owners of houses in a Municipality are entitled to vote at an election of Commissioners although they have not their ordinary places of residence in such Municipality.</i>		Spoor—Kraal—Search—Proof of guilt.	
Thompson v. Okes and Naude ...	143	<i>The provisions of the 200th section of the Native Territories Penal Code were intended to fix with civil and not with criminal liability the heads or owners, as the case may be, of kraals to or in the neighbourhood of which the spoor of stolen animals has been traced.</i>	
3. ——— Municipal Regulations—		<i>On a trial therefore for theft of stock under the Code it is not enough to trace the spoor to the neighbourhood of a kraal, or to prove that the accused had improperly refused to permit a search of his hut in such kraal, but the proof of guilt should be as clear as in any other criminal case.</i>	
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Damages—Proclamation of 26th August, 1885.		<i>Notice of appeal must be given in writing within four days of conviction to satisfy the requirements of Act 21 of 1876, section 4.</i>	
<i>The plaintiff, a native of the Transkei, having been there married to a sixth wife during the lifetime of his other wives, but before the date of the Proclamation of 26th August, 1885,</i>		<i>Verbal notice of intention to appeal is not sufficient, although the Magistrate may have made a note on the record that an appeal had been noted.</i>	
<i>Held, that the Magistrate of St. Marks, against whose judgment the defendant appealed, was justified by native law in awarding damages against another native who had committed adultery with such wife.</i>		<i>In re Mossel Bay Municipality v. Wiggett ...</i>	181
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<i>B., the owner of certain cattle, having agreed to pledge them to P., as security for money advanced, requested J, who had theretofore kept them for B., to keep them in future for P.</i>	
<i>Thereafter J. agreed with P. to keep them for P., the pledgee, as his mandatory and upon the same terms upon which they had been kept for B., the pledgor.</i>	
<i>The messenger of a Magistrate's Court attached the cattle on J's farm in execution of a judgment against B. at the suit of Y.</i>	
<i>Held, reversing the Magistrate's decision in an interpleader suit, that at the time of the attachment there was a</i>	

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<i>valid subsisting pledge of the cattle to P. and that they ought not to have been declared executable at the suit of Y.</i>	
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Principal and surety—Promise to pay— Consideration.	
<i>In an action brought by a creditor against the alleged principal debtor judgment was given for the defendant on the ground that he had incurred no debt in favour of the plaintiff.</i>	
<i>Held, that so long as that judgment stood the plaintiff could not recover the debt from the surety as such.</i>	
<i>Before the action was brought against the principal debtor, the surety promised the creditor that, if he would bring such action, he (the surety) would, failing payment, be liable for the debt and costs.</i>	
<i>Held, affirming the Magistrate's decision, that the plaintiff's trouble and expense in instituting the original action as well as the advantage to the present defendant that the principal debtor should, in the first instance, be held liable, was sufficient consideration for the promise to pay the debt and costs.</i>	
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<i>Oak v. Lumsden</i> (3 Juta, 144) followed.		2. ————— Jurisdiction—Set-off or compensation—Unliquidated damages—Counter-claim.	
<i>Mackie, Dunn & Co. v. McMaster</i> ...	165	<i>In an action brought in a Magistrate's Court for an amount within his jurisdiction the defendant filed two distinct counter claims founded on distinct causes of action, the first being for £20 as unliquidated damages, and the second for £100 likewise as unliquidated damages.</i>	
2. ————— Guarantee—Surety and co-principal debtor—Signature—Forgery—Agency—Insolvency—Cession of rights— <i>Faure v. Louw</i> (1 Juta, 3), <i>McKenzie v. British Linen Co.</i> (L.R. 6, App. Ca. 82), <i>Barber v. Giugell</i> (3 Esp., 60), and <i>Morris v. Bethell</i> (L.R. 5, C.P. 47) discussed— <i>Union Bank v. Beit</i>	67	Held, (1) affirming <i>Scott v. Barnard</i> (2 C.T.L.R., 256) that the Magistrate had jurisdiction to try the first counter-claim as well as the plaintiff's claim, and (2) affirming <i>Smith v. Ramsbotham</i> (Buch., 1878, p. 98) that the second counter-claim although in excess of his jurisdiction, did not justify him in refusing to try the plaintiff's claim.	
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<i>A sale of land having been concluded in the presence of the Secretary to a Board upon condition that the Board should, on the following day, decide to advance the purchase price to the pur- chaser upon security of certain specified properties belonging to him.</i>	
<i>Held, that upon the decision of the Board to advance the money being com- municated to the purchaser, as the borrower, the condition was accom- plished, and the seller was entitled to recover the purchase price, he tendering to effect transfer in due form.</i>	
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<i>The rule that oral contracts for the sale of land should not be enforced unless proved by clear and unimpeachable evidence equally applies to contracts for the sale of servitudes</i>	
<i>The owner of land, upon which there was an avenue, having granted a right of way through the avenue to the owner of one tenement, is not on that account pre- vented from granting a right of way through the same avenue to the owner of another tenement, unless the second servitude interfered with the proper enjoyment of the first.</i>	
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<i>A transferee with such notice has no greater rights as against such third person than the transferor himself pos- sessed.</i>	
<i>The owner of two farms A. and B. transferred A. to a purchaser with a servitude upon B., but the servitude was registered only upon the transfer deed of A.</i>	
<i>The owner afterwards transferred B. to another purchaser, but no reference was made in his deed to the servitude.</i>	
<i>Held, in an action brought by the fur- chaser of A., against the purchaser of B. that in the absence of clear proof that the defendant had notice of the servitude before he purchased B., the plaintiff was not entitled to claim a rectification of the transfer deed of B. by registering the servitude therewith.</i>	
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<i>The Master of a disabled Italian ship which was abandoned and sold at the Port of Algoa Bay, having landed the cargo consisting of deals, which was being conveyed from Moulmein to Devonport, gave notice through his agents to the applicants as represent- atives of the owners of the cargo at the above Port, to the effect that, unless the full amount for which he had pledged the cargo to such agents were forthwith paid he would proceed to realise the cargo.</i>	

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Held, that, inasmuch as the amount so claimed included many items of disbursements, which had no connection with the preservation of the cargo, and the applicants had tendered a sum which, on the face of the account, appeared reasonable, the applicants were entitled to interdict the sale of the cargo pending an action to be brought by them to have the pledge set aside.		18—Insolvency—Proof—Unstamped deed of partnership—Opposition by Treasury to confirmation of liquidation account until a fine had been imposed—No order made by Court— <i>In re Smith's Insolvent Estate</i> ...	223
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